

MYKOLAS ROMERIS UNIVERSITY
LAW SCHOOL
INSTITUTE OF PRIVATE LAW

NADIJA STARTSUN
(EUROPEAN AND INTERNATIONAL BUSINESS LAW)

**PROTECTING SHAREHOLDER RIGHTS IN CROSS-BORDER CORPORATE
MERGER IN THE SINGLE MARKET**

Master thesis

Supervisor –
Prof. dr. Lina Mikaloniene

Vilnius, 2024

TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	3
INTRODUCTION.....	4
1. CONCEPT OF THE CROSS-BORDER MERGER AND POTENTIAL RISKS FOR SHAREHOLDER RIGHTS.....	9
1.1. Concept of Cross-Border Merger in EU Company Law.....	9
1.2. Potential Risks for Shareholder’s Rights in Cross-Border Merger.....	16
2. GENERAL OVERVIEW OF MECHANISMS PROTECTING SHAREHOLDER RIGHTS IN CROSS-BORDER MERGERS IN THE SINGLE MARKET.....	21
2.1. Right to Information and Right to Vote on Approval of the Cross-Border Merger as Tools for Protection of Shareholder’s Rights.....	21
2.2. Exit Right as a Tool for Protection of Shareholder’s Rights.....	30
2.3. Right to Dispute the Share Exchange Ratio as a Tool for Protection of Shareholder’s Rights.....	36
3. ANALYSIS OF THE IMPLEMENTATION OF DIRECTIVE 2017/1132 PROVISIONS PROTECTING THE SHAREHOLDER’S RIGHTS IN THE CROSS-BORDER MERGERS IN THE SINGLE MARKET INTO COMPANY LAW OF SELECTED JURISDICTIONS.....	42
3.1. Germany.....	42
3.2. Ireland.....	52
3.3. Belgium.....	60
CONCLUSIONS.....	69
RECOMMENDATIONS.....	71
LIST OF BIBLIOGRAPHY.....	72
ABSTRACT.....	80
SUMMARY.....	81
HONESTY DECLARATION.....	82

LIST OF ABBREVIATIONS

CBM – cross-border merger

CBMD – the Cross-Border Mergers Directive

ECJ – the European Court of Justice

EEA – the European Economic Area

EU – the European Union

Para. – paragraph

Subpara. – subparagraph

TFEU – the Treaty on Functioning of the European Union

INTRODUCTION

The relevance of the master thesis. The research of this master thesis is narrowed to the protection of the shareholder's rights in corporate cross-border merger in the EEA single market. Cross-border mergers involve companies governed by the laws of different Member States which requires the existence of a harmonised legal framework, that would regulate the protection of shareholder rights. As to the protection, shareholders are faced with perils arising from the cross-border merger. Among them are the change of applicable law, that makes shareholders deal with completely different legal jurisdictions, possible value-destroying effect on the company's assets, etc.

The lack of harmonization of safeguards for shareholders is an obstacle to cross-border mergers. Among Member States, there are many different forms of protection, which lead to complexity and legal uncertainty.¹ Hence, the harmonized regime of the EU company law, which contains the provisions on the shareholder's rights protection in cross-border mergers was implemented in Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 with further amendments by Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019.

The Directive introduces minimum harmonization for the protection of all shareholders of merging companies in order to unify the rules among different Member States. That means that Member States are able to introduce additional regulations on protection for shareholders. This master thesis will analyse the way Germany, Ireland and Belgium have implemented these rules on protection for shareholders in cross-border mergers. Each of the selected jurisdictions represents developed and influential economics in EEA. Germany had an elaborate legal framework on shareholder rights protection within corporate cross-border mergers, while Ireland and Belgium didn't provide for certain mechanisms protecting shareholders contained in the Directive until recent implementation.

Scientific research problem. Cross-border mergers within the EU internal market pose risks for shareholder rights, in particular, because the legal systems of the merging companies provide different levels of safeguards for shareholders. Article 126a of Directive 2019/2121, dedicated to the protection of shareholders, ensures a broad-based range of safeguards. Among them are the right to information; the exit right for dissenting shareholders; the right to claim additional cash compensation for the shareholders, who exercised the exit right; the right to challenge the share exchange ratio and to ask for a cash payment for the shareholders, who did not

¹ Recital 17 of the Preamble of Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, EUR-lex, accessed 2 October 2024, <https://eur-lex.europa.eu/eli/dir/2019/2121/oj>

have or did not exercise the exit right. While containing minimum harmonization rules, the Directive permits Member States to adopt more complex and advanced protection mechanisms. The experience of developed legal systems of Germany, Ireland and Belgium, each of which adopted the Directive into its national legislation, can serve as an example of how Member States can transfer protection mechanisms into domestic company law. In light of stated above, the main question of this master thesis is: **do the national legal frameworks of selected jurisdictions contain harmonised protection mechanisms to protect shareholder rights in corporate cross-border mergers in the single market?** The current research is aimed at answering this question.

The level of the analysis of the research problem. The research boundaries of the thesis include the analysis of the concept of the cross-border merger in the single market; the assessment of the risks that shareholders face in the case of cross-border mergers; the analysis of selected mechanisms protecting the shareholder's rights contained in Directive 2017/1132 (with amendments by the Directive 2019/2121); the analysis of the implementation of the selected protection mechanisms in three EEA jurisdictions: Germany, Ireland and Belgium.

The literature in the sphere of the protection of the shareholders' rights in corporate cross-border mergers includes the works of Prof. Dr. Jessica Schmidt,² who dedicated many notable works in the current field; important researches on the application of cross-border mergers Directive were conducted by Bech-Bruun and Lexidale;³ remarkable study on minority shareholders protection was prepared by TGS Baltic.⁴ The problem has been studied by scholars from different angles, for instance, recent work by Mikalonienė L. and Kolev N.⁵ on the exit right of a minority shareholder in comparative view; Papadopoulos T.,⁶ who conducted a comprehensive analysis of cross-border mergers after Directive 2019/2121, and assessed Member States' national experiences with implementing the shareholders' rights protection; the work by

² Jessica Schmidt, "Cross-Border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package," *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019); Jessica Schmidt, "The Mobility Aspects of the EU Commission's Company Law Package: Or – "The Good, the Bad and the Ugly", *European Company Law* 16, no. 6 (2019). <https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019003>.

³ European Commission: Directorate General for the Internal Market and Services., Bech Bruun., and Lexidale., *Study on the Application of the Cross-Border Mergers Directive*, Luxembourg: Publications Office, 2013. <https://data.europa.eu/doi/10.2780/96404>.

⁴ European Commission, Directorate General for Justice and Consumers and TGS Baltic, *Study on Minority Shareholders Protection: Final Report 6* (LU: Publications Office, 2018), <https://data.europa.eu/doi/10.2838/658269>.

⁵ Lina Mikalonienė and Nikolay Kolev, "The Statutory Exit Right of a Minority Shareholder in a Private Limited Company under Lithuanian and Bulgarian Company Law," *International Comparative Jurisprudence* 10, no. 1 (2024), <https://heinonline.org/HOL/Page?handle=hein.journals/icjuris10&collection=journals&id=144&startid=144&end=158>

⁶ Thomas Papadopoulos, "Protection of Shareholders in Cross-Border Mergers: The New Harmonized Rules", *European Company and Financial Law Review* 18, no. 6 (2022), <https://doi.org/10.1515/ecfr-2021-0038>.; Thomas Papadopoulos, "Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121," (2023). *European Business Law Review (Kluwer)*, Volume 34, Issue 5, 2023, <https://ssrn.com/abstract=4566841>.

Khamichonak T. and Alavi H.,⁷ who in their article raises question of the lacking of harmonization as to the protection of dissenting minority shareholders; Teichmann C.,⁸ who analyzed the content of the Company Law Package; also authors such as prof. Winner M.⁹; Knapp V.¹⁰; Kurtulan G.¹¹; Ventrizzo M.¹²; Benedetti L.¹³

Scientific novelty of the master thesis. The problem of shareholder protection in the company has received a lot of attention from scientists. The relatively recent amendments by Directive 2019/2121 added new safeguards for shareholders, which need to be implemented and used by the Member States. Despite the fact that there are scientific works and articles devoted to the problematic question of the exercising of the shareholder's rights and their protection, there is still room for comprehensive assessment and analysis of how certain Directive provisions were implemented by chosen Member States: Germany, Ireland and Belgium. In light of stated above, conducting the research on the topic chosen will be relevant and useful for providing an additional approach to the research of problematic aspects in the protection of shareholder's rights during corporate cross-border mergers in the single market.

The aim of the master thesis is to conduct research on existing mechanisms for shareholder's rights protection in cross-border mergers in the single market, contained in Directive 2017/1132 and assess how those mechanisms are implemented into the company law of selected jurisdictions.

The objectives of the master thesis. In order to achieve the aim of the master thesis the following objectives are to be completed:

1) To analyse the concept of cross-border merger and to define the main perils to the shareholder rights in a cross-border merger in the single market;

⁷ Hamed Alavi and Tatsiana Khamichonak, "To Be or Not to Be; the EU Cross-Border Mergers Framework and Harmonization of Dissenting Shareholder's Rights," *Hungarian Journal of Legal Studies* 58, no. 3 (2017), <https://heinonline.org/HOL/P?h=hein.journals/ajur58&i=310>

⁸ Christoph Teichmann, "The Company Law Package - Content and State of Play," *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019), <https://heinonline.org/HOL/P?h=hein.journals/ecomflr16&i=3>

⁹ Martin Winner, "Protection of Creditors and Minority Shareholders in Cross-Border Transactions," *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019), <https://heinonline.org/HOL/P?h=hein.journals/ecomflr16&i=44>

¹⁰ Vanessa Knapp, "Cross border mobility: what do we need in practice?" *ERA Forum* 19, (2018), <https://doi.org/10.1007/s12027-018-0495-6>

¹¹ Gokce Kurtulan, "Minority Shareholder Protection in Cross-Border Mergers: A Must for or an Impediment to the European Single Market?," *European Business Organization Law Review* 18, no. 1 (2017), <https://heinonline.org/HOL/P?h=hein.journals/eunbuioiz18&i=101>

¹² Marco Ventrizzo, "Cross-Border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights Under Italian Law," Penn State Legal Studies Research, Bocconi Legal Studies Research Paper No. 16, *European Company and Financial Law Review (ECFR)*, 2007, <https://ssrn.com/abstract=960579>

¹³ Lorenzo Benedetti, "The Protection of Shareholders in Cross-Border Conversions, Mergers, and Divisions," *Orizzonti del Diritto Commerciale: Rivista on Line Dell'Associazione Italiana dei Professori Universitari di Diritto Commerciale*, no. 3 (2023), <https://heinonline.org/HOL/P?h=hein.journals/oidldoco2023&i=1015>

2) To determine and analyze the mechanism of shareholder's rights protection in cross-border mergers contained in the Directive;

3) To analyze the implementation of mechanisms protecting the shareholder's rights, presented by the Directive, into company law of the selected Member States: Germany, Ireland, and Belgium.

The practical significance of the master thesis. This master thesis should be of practical use to legal scholars, whose scientific interests lie within the sphere of cross-border mergers, also stakeholders' protection, shareholders in particular. This master thesis also will be useful for legal practitioners, who deal with cross-border mergers within selected jurisdictions in their professional sphere, and who specialize in the disputes on protection of shareholder's rights during those mergers. This master thesis will be of practical use to law students, who are interested in corporate law and would like to widen and deepen their knowledge in the specific area of shareholders protection. Lastly, the master thesis will be useful for the legislators, as it will contain the analysis of legislative pieces with further recommendations on what to improve in the current legislation.

Methods used in the master thesis. Several methods are to be used during the current scientific research. First, to achieve the aim of this thesis, it is necessary to examine, analyze and study many legal acts and doctrines, in particular legislation of the European Union, research of the Commission, organizations and legal firms, the scientific works of scholars, etc. Therefore, with the help of **the data collection and data analysis** methods data will be collected and certain conclusions will be made. Secondly, **the comparative** method is to be used to provide a comparison between approaches among different Member States towards the mentioned problematics. Thirdly, the **linguistic** method is to be used, to correctly understand concepts, contained in the legislation, and access the spirit of the law by reading and interpreting the letter of the law. Fourthly, the **logical** method is to be used as the way to place elements of the research into one logically structured work, convenient and easily accessible, and as a tool to elaborate on the possible solutions.

The structure of the master thesis. It consists of two parts – **general and special** – which are further divided into three chapters and subchapters. The **first chapter** introduces the concept of cross-border merger, outlines the development of its regulation, key characteristics of what merger is considered as cross-border, subject scope and the importance of freedom of establishment for proper functioning of corporate mobility. It also defines the main risks shareholders face in cross-border mergers. The **second chapter** analyzes the mechanisms protecting shareholder's rights in corporate cross-border mergers contained in Directive 2017/1132 as amended by Directive 2019/2121. Among them the right to information and to

vote on the approval of common draft terms of cross-border merger, the exit right for dissenting shareholders together with the right to claim cash compensation for one's shares and the right to dispute share exchange ratio for remaining shareholders with the possibility to claim additional cash payment. The **third chapter** assesses the way selected jurisdictions – Germany, Ireland and Belgium – have implemented the outlined protecting rules onto their national company law together with the peculiarities of each jurisdiction's approach.

The defended statements.

1. The shareholder rights in corporate cross-border mergers in the single market within selected jurisdictions are protected by the Directive's mechanisms, provided that national company law aligns with the relevant mandatory Directive's provisions.

1. CONCEPT OF THE CROSS-BORDER MERGER AND POTENTIAL RISKS FOR SHAREHOLDER RIGHTS.

The concept of cross-border merger in EU legislation has been developing since the adoption of Directive 2005/56/EC¹⁴ (also known as the Cross-Border Merger Directive), with a constant improvement and enhancement. The attention was paid not only to the existence of the possibility of a cross-border merger but also to the improvement and facilitation of the procedure for its implementation. The regulation underwent refinement to ensure that cross-border mergers are not only possible as a matter of fact and regulated by the relevant legislation, but also provide attention to the protection of the shareholder's rights. It is ensured, that the rights of companies to merge across borders go hand in hand and be properly balanced with the protection members.¹⁵ The legislation governing cross-border mergers was formed on the ground of important European law principles and doctrines. It can be stated that the existence of cross-border mergers follows from, but not only, the principle of freedom of establishment – expressed in current articles 49 and 54 of the Treaty of the Functioning of the European Union.¹⁶

1.1. Concept of Cross-Border Merger in EU Company Law

By using the term “concept” of cross-border merger, it is referred to as “a principle or idea”¹⁷ of the latter, formed through research and analysis of the legislation and scientific literature. The understanding of concepts helps to comprehend the framework of a certain subject or phenomenon. The notion of concept is broader than the definition. It also includes the principles, subject based upon, legal regulation, and scope. Therefore, the concept of cross-border merger refers to the principle or idea of a merger between companies governed by a law of different Member States, to its place in European company law, to the development of its regulation and its scope.

To wholly reveal the concept of cross-border mergers in European Union legislation, it is vital to pay attention to the development of legal regulation of cross-border mergers. Therefore its regulation started with Directive 2005/56/EC (the Cross-Border Mergers Directive).¹⁸ Before the implementation of the CBMD in 2005, an important possibility for company law was missing: the possibility for limited liability companies to merge across borders within the European Union and

¹⁴ “Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies,” EUR-lex, accessed 2 October 2024, <https://eur-lex.europa.eu/eli/dir/2005/56/oj>

¹⁵ Recital 4 of the Preamble of Directive 2019/2121, *supra note*, 1

¹⁶ “Consolidated version of the Treaty on the Functioning of the European Union,” EUR-lex, accessed 2 October 2024, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

¹⁷ “Definition of concept from the Cambridge Academic Content Dictionary,” *Cambridge University Press*, accessed 31 October 2024, <https://dictionary.cambridge.org/dictionary/english/concept>

¹⁸ Directive 2005/56/EC, *supra note*, 14.

the European Economic Area on the basis of a predictable and structured framework. The implementation of such a possibility would strengthen the European financial market.¹⁹

According to such an important need, Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies²⁰ was adopted. The CBMD was greatly met by legal practitioners and scholars. As stated in a prominent report prepared by Lexidale and Bech-Bruun in 2013, “There is strong and substantial evidence that the CBMD has brought about a new age of cross-border mergers activity. Stakeholders have consistently reported their satisfaction with the Directive and consider it to be an important step toward a more vibrant and robust market environment within the EU and EEA”.²¹ This once again confirms the comprehensiveness of the adopted CBMD, its positive impact on the regulation of cross-border mergers, its innovation and satisfaction with its by practitioners. It is vital to mention other strong sides of the implementation of the Directive 2005/56/EC, among them the increasing merger activity with a greater volume of cross-border mergers.²²

Although the Directive was, in general, successful, there still remained a number of discrepancies and obstacles that interfered with its full effectiveness. Two main factors impeded the successful implementation of the Directive. One of them connected to an improper transposition of the Directive, and another related to the practical difficulties that have emerged in the process of implementing the Directive; also, it was pointed out the absence of standards or procedures for the communication between the national registries of different Member States.²³ As it was also stated in the scientific works, “deficiencies reported in the studies were mainly related to the national standards of creditor and minority shareholder protection. The existing framework gives leeway to the Member States, leaving the substantial protective rules to them.”²⁴

The further development of the cross-border merger regulation was requested by the European Parliament in 2017,²⁵ which pointed out that in order to provide improved company mobility within the European Union, it is important to have a common legal framework on company mergers, divisions and transfers operations. And that this framework should be comprehensive and simplify the procedures and requirements applicable to mergers.

¹⁹ European Commission: Directorate General for the Internal Market and Services., Bech Bruun., and Lexidale., *Study on the Application of the Cross-Border Mergers Directive*, Luxembourg: Publications Office, 2013. <https://data.europa.eu/doi/10.2780/96404>.

²⁰ Directive 2005/56/EC, *supra note*, 14.

²¹ Bech Bruun and Lexidale, *supra note*, 19: 3-5.

²² *Ibid.* 5.

²³ *Ibid.* 52, 60.

²⁴ Teichmann, *supra note*, 8: 8.

²⁵ “European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI)) (2018/C331/04),” EUR-lex, accessed 23 October 2024, p. 1-2, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0248>

Therefore, in its resolution, the European Parliament calls for improvement in the existing framework mechanism, with an accent on the rights of minority shareholders and “the protection of certain minority shareholders” rights, such as the right of inquiry into a merger, the right to compensation for a shareholder who relinquishes his holding on account of opposition to a merger, and the right to contest the fairness of the exchange ratio [...]”.²⁶ It proves that the upcoming Directive was aimed at additional comprehensive protection on shareholders rights.

The further buildout of the cross-border merger regulation is presented by the adoption of Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.²⁷ As it was stated in the doctrine, “the major achievement of the CBMD and title II ch II CLD is the creation of a clear, predictable and structured EU legal framework, providing the legal security essential for such complex transactions and significantly reducing the transaction costs”.²⁸

In 2018, one year after the adoption of Directive 2017/1132,²⁹ the EU Company Law Package was proposed.³⁰ The CLP is a plan that consists of the proposals for the adoption of two directives: a directive about the use of digital tools and processes in company law and a directive about cross-border conversions, mergers and divisions.³¹ As it was stated in the executive summary of the impact assessment accompanying the proposal, companies had difficulties in accessing markets in different Member States due to inefficiencies in the current EU rules for cross-border mergers and, as a consequence, were forced to find expensive alternatives to direct procedures. Relevant stakeholders, such as minority shareholders, are faced with uncertainty as to their rights and protections in cross-border situations, which can deter them from doing cross-border business.³²

The EU Company Law Package was greatly met by scientists, for example, prof. C. Teichmann, in his analytical work on the assessment of the Company Law Package, evaluates the latter as a great achievement with appropriate attention to the protection of the shareholder’s rights

²⁶ *Ibid.*, 4.

²⁷ “Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification),” EUR-lex, accessed on 23 Oct 2024, <http://data.europa.eu/eli/dir/2017/1132/oj>

²⁸ Jessica Schmidt, "Cross-Border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package," *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019), p. 223.

²⁹ Directive 2017/1132, *supra note*, 27.

³⁰ “Proposal for a directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and Proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions including annexes,” Directorate-General for Justice and Consumers, European Commission, accessed 2 October 2024, https://commission.europa.eu/publications/company-law-package_en#details.

³¹ *Ibid.*

³² "Executive summary of the impact assessment - Proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions and as regards the use of digital tools and processes in company law,” Directorate-General for Justice and Consumers, European Commission, accessed 2 October 2024, https://commission.europa.eu/publications/company-law-package_en#details.

and harmonisation.³³ Therefore, in 2019, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 was amended by Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019.

In the amended Directive 2019/2121, article 126a is dedicated to the protection of shareholders. In particular, article 126a includes protection not only of minority shareholders but of a much wider range. It includes the protection of at least shareholders of the merging companies who voted against the approval of the common draft-terms of the cross-border merger. Now, shareholders are granted the right to dispose of their shares for adequate cash compensation – in other words, the exit right for dissenting shareholders. If shareholders decide to exercise this right, but they consider that the cash compensation has been inadequately set, they are provided with the right to claim additional cash compensation.

Besides, article 126a ensures that shareholders who did not have or did not exercise the right to dispose of their shares but who consider that the share exchange ratio set out in the common draft-terms of the cross-border merger is inadequate may dispute that ratio and claim a cash payment. So, it can be concluded that the amended Directive provided two additional protection tools: an exit right and a right to challenge the exchange ratio.³⁴ After Directive 2019/2121, Member States must adopt the shareholder's rights protection measures mandatory.

The following aspect of the concept of cross-border merger is the definition and key characteristics of cross-border merger. In order for a certain operation to be treated as a cross-border merger, it must correspond to some characteristics. The analysis boundaries lay within the types of cross-border mergers that are followed by issuance to the company's shareholders shares or other securities representing the capital of the successor company in exchange for the first company's assets and liabilities – a merger by acquisition and a merger by formation of a new company.

In a nutshell, a merger constitutes a consolidation of two or more companies, with just one company continuing to exist. The company that results from this consolidation may have two forms. First is when one of two or more companies remained and acquired another two or more companies, which in this case is called an acquiring company. For example, company A merges with company B, and after the merger only company B survives. Second is when two or more consolidating companies create a new company which has not existed before, which is called a

³³ Teichmann, *supra note*, 8: 13-14.

³⁴ Davies, Paul L. and Emmenegger, Susan and Ferran, Eilis and Ferrarini, Guido and Hopt, Klaus J. and Moloney, Niamh and Opalski, Adam and Pietrancosta, Alain and Roth, Markus and Skog, Rolf R. and Winner, Martin and Winter, Jaap W. and Winter, Jaap W. and Wymeersch, Eddy O., "The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment", *European Company and Financial Law Review Forthcoming, Oxford Legal Studies Research Paper* No. 25/2018, p. 12, <https://ssrn.com/abstract=3257846>

new company. For example, when companies A, B, and C merge into the newly created company ABC.

In both cases, the remaining company after consolidation may be called a successor company, as it inherits all the assets and liabilities of the rest of the companies participating in a merger. Hence, the successor company (either acquiring or newly created), in exchange for the assets and liabilities of previous companies, shall issue shares equal to the capital of dissolved companies to their shareholders. For example, when company A and B merge by formation of a new company, company AB shall issue shares to shareholders of company A and company B, who are now shareholders of company AB.

Therefore, the ownership in the successor company is now unified, and neither belongs to company A nor B, but to company AB. The successor company continue its business using the inherited assets, i.e. instruments, inventory, machinery, intellectual property, digital assets (domains), investments, etc. Companies taking part in a merger must continue business as one entity, having unified assets and liabilities in exchange for the issue to their shareholders of shares equal to the capital, and operate as one company because, in another case, such an operation will not be treated as a merger, but as an acquisition.

Now, for the operation outlined afore to be treated as a *cross-border* merger, every company participating in a merger shall have their registered office, central administration, or principal place of business within the EEA, and at least two of the companies participating in the merger shall be governed by the laws of different Member States.³⁵ For example, company A (having it registered office in Austria), company B (having it registered office in Belgium) and company C (having it registered office in Cyprus) decide to merge with a condition that company B acquire company A and C, their assets and liabilities in exchange issues shares equal to the capital of the company A and C for their shareholders. Such a merger shall be treated as a cross-border merger since every entity participating is established within EEA, and at least 2 of them are governed by company law of different Member States.

Hence, under Directive provisions, the merger is treated as cross-border when, in the role of subjects, it involves limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union, provided at least two of them are governed by the laws of different Member States. The Cross-Border Mergers Directive³⁶ contained an almost identical definition of cross-border mergers.

³⁵ Article 118 of Directive 2017/1132, *supra note*, 27.

³⁶ Article 1 “Scope” of Directive 2005/56/EC, *supra note*, 14.

In view of the concept of cross-border mergers within the company law framework, it is also important to mention the subject scope of cross-border mergers under the Directive. Member States have different rules concerning determining the law applicable to a company and the overall recognition of foreign companies.³⁷ It caused difficulties and created obstacles to the freedom of establishments, e.g. when one state rejected the registration of the merger on the grounds that the transferring company was not established in the latter Member State, as it was in the SEVIC case. Hence, there was a need for an exhaustive list of the legal entity that was established under similar rules and would be recognisable by every Member State. Therefore, under the term “limited liability company,”³⁸ there is a wider meaning than literal, which includes a reference list of types of companies eligible to have a part in cross-border mergers, listed as Annex II³⁹ in the Directive.

An Annex II includes both companies with public and private nature, because it is up to the Member State to define what companies can participate in cross-border merger. A company types for the purpose of the Directive in, for instance, Germany are *die Aktiengesellschaft* (AG), *die Kommanditgesellschaft auf Aktien* (KGaA) and *die Gesellschaft mit beschränkter Haftung* (GmbH)⁴⁰; in Ireland is *cuideachtaí atá corpraithe faoi dhliteanas teoranta* / companies incorporated with limited liability; in Belgium are *naamloze vennootschap / société anonyme* (NV / SA), *commanditaire vennootschap op aandelen / société en commandite par actions* (CommVA / SCA), *personenvennootschap met beperkte aansprakelijkheid / société de personnes à responsabilité limitée* (SRL).⁴¹

It should be noted that under TFEU⁴² freedom of establishment covers not only limited liability companies but any company created under civil or commercial law, save for non-profit. For example, many Member States, among which Belgium, allow domestic, or even cross-border mergers for associations, among which Germany.⁴³ Therefore, it remains unclear why some types of legal entities, e.g. partnerships, are not permitted to merge cross-border, and legal scholars

³⁷ Peter Behrens, "International Company Law in View of the Centros Decision of the ECJ," *European Business Organization Law Review* 1, no. 1 (2000), p.127, <https://heinonline.org/HOL/P?h=hein.journals/eunbuioiz1&i=133>.

³⁸ Article 119 paragraph 1 (a) of Directive 2017/1132, *supra note*, 27.

³⁹ Annex II “Types of companies referred to in Articles 7(1), 13, 29(1), 36(1), 67(1), points (1) and (2) of Article 86b, point (a) of Article 119(1), and point (1) of Article 160b” of Directive 2017/1132, *supra note*, 27.

⁴⁰ AG - the joint-stock company, public; KGaA - publicly traded partnership; GmbH - the limited liability company, private.

⁴¹ NV / SA - limited company, public; CommVA / SCA – limited liability partnership; SRL – limited liability company, private.

⁴² Article 54 paragraph 2 of the TFEU, *supra note*, 16.

⁴³ European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Comparative Legal Analysis of Merger Rules Concerning Associations in the EU - Final Report*, Luxembourg: Publications Office of the European Union, 2023, p. 8, <https://data.europa.eu/doi/10.2873/05056>

expressed the opinion that the subject scope of the Directive should be extended to all legal entities within Article 54 TFEU.⁴⁴

On that account, companies that are participating subjects in cross-border mergers are permitted to pursue economic activities in different Member States, especially given that cross-border mergers not only constitute a method of exercise of freedom of establishment,⁴⁵ but also a means of external growth.⁴⁶ CJEU broadly interprets freedom of establishment, including into this category both primary and secondary establishment as well as different types of economic activity.⁴⁷ While the Directive's substantive and procedural provisions have to be transposed and implemented into each Member State's company law for the purpose of harmonisation, the freedom of establishment is directly applicable to companies even when company law has not been completely harmonised.⁴⁸

Moreover, the prohibition of restrictions on the freedom of establishment became not only a legal rule but an important principle in legal doctrine. Firstly, by the fact of its direct applicability, as it was mentioned by ECJ, in, among others, the CLT-UFA case: "[...] Article 52 of the Treaty constitutes one of the fundamental provisions of Community law and has been directly applicable in the Member States [...]".⁴⁹ By this, ECJ emphasise not only the fact of the existence of such a legal norm contained in TFEU but also the fundamental nature of it as a principle of European Union company law.⁵⁰ Again, the long-established practice of the ECJ is an example of this, in particular, in the prominent Costa case: "It is therefore legally complete in itself and is consequently capable of producing direct effects on the relations between Member States and individuals."⁵¹

⁴⁴ Jessica Schmidt, Directorate-General For Internal Policies Policy Department Citizens' Rights And Constitutional Affairs, *Cross-border mergers and divisions: Is there a need to legislate?* European Union, 2016, p.17. <http://www.europarl.europa.eu/supporting-analyses>

⁴⁵ Harm van den Broek, "Exit Taxation of Cross-Border Mergers After National Grid Indus", *Studi Tributari Europei* volume 3 number 1, (2011), p. 33, <https://doi.org/10.6092/issn.2036-3583/4819>.

⁴⁶ Stefan Grundmann, *European Company Law. Organization, Finance and Capital Markets. 2nd edition.*, (Cambridge: Intersentia, 2012), p. 582.

⁴⁷ Johan Meeusen, "Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-Border Corporate Mobility in the Internal Market," *Journal of Private International Law* 13, no. 2, (2017), p. 317, <https://doi.org/10.1080/17441048.2017.1353819>.

⁴⁸ CJEU, judgement of 9 March 1999, Centros Ltd, Case C - 212/97, §28, ECLI:EU:C:1999:126. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0212>

⁴⁹ CJEU, judgement of 23 February 2006, CLT-UFA SA v Finanzamt Köln-West, Case C-253/03 §12. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0253>

⁵⁰ See also CJEU, judgement of 28 January 1986, Commission of the European Communities v French Republic, Case C - 270/83, §13, 22. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0270>

⁵¹ CJEU, judgement of 15 July 1964, Flaminio Costa v E.N.E.L., Case C-6/64 p.596. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A61964CJ0006>; see also CJEU, judgement of 15 February 1996, Inasti (Institut National d'Assurances Sociales pour Travailleurs Indépendants) v Hans Kemmler Case C-53/95 §9. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0053>

Secondly, it has priority over national rules; thus, Member States have an obligation to modify laws incompatible with the freedom of establishment. In particular, one sees in the *Commission v Italy* case: “[...] directly applicable provisions of the Treaty are binding on all the authorities of the Member States, and they must therefore comply with them without its being necessary to adopt national implementing provisions.”⁵² ECJ stresses the importance of the possibility of relying on the provisions of the TFEU as a minimum guarantee.

Undoubtedly, corporate mobility within the EEA constitutes a cornerstone of economic development. One of the elements of corporate mobility – the possibility to merge across borders – contributes to the development of internal market and economic integration and is based on the freedom of establishment. The fundamental nature of this principle was confirmed not once in the most prominent decisions of the European Union Court of Justice, such as *SEVIC* case⁵³, where it was stipulated that cross-border mergers are protected by freedom of establishment. Given that companies in EEA would be restricted from merging across borders and denied equal treatment as to the free movement of goods and capital, the single market would not function properly or even become an illusion.⁵⁴

To sum up, **this subchapter** introduces the concept of cross-border mergers in European company law and, in particular, covers key characteristics of cross-border mergers. It explains what operations are treated as cross-border mergers, the development of its regulation until nowadays, its subjective scope and the role of freedom of establishment for corporate mobility within EEA.

1.2. Potential Risks for Shareholder’s Rights in Cross-Border Merger

The mere need for shareholder rights protection comes from the potential risks that exist in the course of performing cross-border operations, such as cross-border mergers. As the cross-border merger is a complex transaction, it tackles the rights and interests of shareholders of the two merging companies. Now, to understand what exactly the legislator was trying to protect shareholders, it is important to distinguish and analyse the risks, or in other words, dangers, the shareholders face in cross-border mergers.

The first risk is that the cross-border merger may result in a change of applicable law for shareholders of the company.⁵⁵ Each company is governed by *lex societatis*. However, in cross-border mergers, one of the companies participating ceases to exist, and the surviving company

⁵² CJEU, judgement of 15 October 1986, *Commission of the European Communities v Italian Republic*, Case C-168/85 §11. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0168>

⁵³ CJEU, judgement of 13 December 2005, *Sevic Systems AG*, Case C-411/03, ECLI:EU:C:2005:762, InfoCuria. Case-law. Accessed 29 October 2024. <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/03>

⁵⁴ Behrens, *supra note*, 37: 129.

⁵⁵ Winner, *supra note*, 9: 63; Recital 18 of the Preamble of Directive 2019/2121, *supra note*, 1.

adopts the law of the receiving Member State. Hence, in a cross-border merger, a change of law can only affect the members of a transferring company. Cross-border mergers are effective ways to change the applicable company law on purpose while, at the same time, keeping the identity of the company and avoiding the need to formally wind up and reincorporate.⁵⁶ Therefore, the change of applicable law can be a goal of a cross-border merger or “an indirect consequence of a transaction that has an underlying substantive economic goal”.⁵⁷ This has a direct impact on the governance of the company, the rights and obligations of the shareholders and on the legal framework in general.⁵⁸ Moreover, majority requirements for decision approval and competent authority may change as a result of a change of applicable law.⁵⁹ While the company itself and majority shareholders are prepared for such a change in applicable law, for minority shareholders it may not always be the case. Minority shareholders may be forced to accept the change of the applicable company law and the following change of jurisdiction.⁶⁰

In a nutshell, it is generally considered that the shareholders are more familiar with the national law of the company, where they hold shares, and therefore are better acknowledged with the protection methods offered by the latter, and not in the law of another Member State, that governs the acquiring company. Some scholars, however, question the fact that a change in applicable law can pose a serious threat to shareholders. It is argued that a mere change of applicable law does not constitute such a peril, as, for example, a change of “the distinguishing characteristics of the corporate format of the surviving company”.⁶¹ It is indeed easier to protect one’s interests and initiate proceedings under a known company law system.

But also seems logical the approach according to which the change of applicable law itself in a modern globalised world shall become less and less of a peril given a few moments. First of all, corporate mobility within the single market and the idea of the single market itself is based on the perception that it should be not just legally possible but practically achievable to move across borders. Otherwise, there would be no sense in providing a legal framework and guaranteeing the freedom to establish.⁶² Secondly, the laws of different Member States are often aligned with each other, including by current level of harmonisation, many of them share common principles,

⁵⁶ Kurtulan, *supra note*, 11: 106.

⁵⁷ Ventrizzo, *supra note*, 12: 10-11.

⁵⁸ Steef M. Bartman, “10 Years Cross-Border Mergers Directive: Some Observations About EU Border Protection and Minority Exit Rights,” *European Company Law Journal* 14, no. 6 (2017): p. 216. <https://kluwerlawonline.com/journalarticle/European+Company+Law/14.6/EUCL2017032>

⁵⁹ European Commission: Directorate-General for Justice and Consumers, *Study on the law applicable to companies – Final report*, (Luxembourg: Publications Office of the European Union, 2016), p. 331, <https://data.europa.eu/doi/10.2838/527231>

⁶⁰ Grundmann, *supra note*, 46: 587.

⁶¹ Marieke Wyckaert and Koen Geens, “Cross-border mergers and minority protection. An open-ended harmonization”, *Utrecht Law Review*, 4 (1), 2008, cited pp. 49-50, <https://doi.org/10.18352/ulr.60>

⁶² This opinion can be supported by the view expressed in the Polbud case (Case C-106/16), where Court interpreted the freedom of establishment as freedom to choose the legal system under which the company operates.

standards and protection mechanisms. As a result, while a change in the applicable law might create some administrative or procedural hurdles, it's unlikely to introduce a completely unfamiliar legal framework for shareholders.

Lastly, the further harmonisation will advance on the EU level, the more the peril of change of applicable law ceases to exist. With the adoption of the CBMD, where shareholders were protected mainly by means of information, to the adoption of Directive 2017/1132 with the current amendment by Directive 2019/2121, where complex protection tools are contained – the company law of Member States become more and more harmonised, and by this – similar. Naturally, there still remain differences concerning procedural law and traditions of each country, which threaten shareholders to deal with. Therefore, in order to create a full-fledged internal market, it is unavoidably necessary to put more efforts into the harmonisation of protection mechanisms from the best company law practices of Member States. Indeed, the consistent and harmonised legal environment will make such changes more predictable and manageable.

On the stage of preparing common draft terms of cross-border mergers, the share exchange ratio is about to be set and included as a mandatory part of the common draft terms.⁶³ Therefore, the second risk for shareholder rights in cross-border mergers is that the exchange ratio for shareholders may be inadequately set. Even if the transaction is, in general, value-enhancing, shareholders may receive inadequate consideration.⁶⁴ Professor Martin Winner, in his detailed work on the protection of stakeholders in cross-border transactions,⁶⁵ analysed this risk. An exchange ratio that is inadequately set may be a problem for both the shareholders of the transferring company and the acquiring company. This happens despite the fact that the shareholders of the acquiring company don't lose their shares in any way. Also, shareholders in cross-border mergers between equal companies and inside intra-group are under this risk.⁶⁶ In the case of intra-group, this risk may even be more detrimental for shareholders, as two merging companies are perceived as parent company and subsidiary; therefore, the terms of the cross-border merger may not be well negotiated, which may lead to the existence of detrimental position for minority shareholders in the subsidiary.⁶⁷

The problem of potentially inadequately set exchange ratio is dangerous for shareholders also because it is impossible for them to challenge the approval of the cross-border merger solely on the grounds that the share exchange ratio has been inadequately set.⁶⁸ At the same time, as a way of a safeguard for shareholders, it is stipulated that there should be an expert's opinion as to

⁶³ Article 122 of Directive 2017/1132, *supra note*, 27.

⁶⁴ Winner, *supra note*, 9: 62.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Article 126 para. 4(a) of Directive 2017/1132, *supra note*, 27.

whether the cash compensation and the share exchange ratio are adequate.⁶⁹ Although the whole approval of a cross-border merger is protected from challenge on the grounds of the problem mentioned, it is still possible to dispute the share exchange ratio before a competent Court.⁷⁰

The share exchange ratio is determined based on valuation methods. Hence, another aspect of this risk for shareholders is a variety of approaches to determine the merger ratio. Among Member States, different valuation methods are used. For instance, with regard to the merger ratio, in Germany, the capitalised earnings method (*Ertragswertverfahren*) prevails, and France applies a multiple criteria approach (*approche multicritères*).⁷¹ As to the transfer value, most Member States apply one of the most common valuation methods— either the fair value method or the book value method.⁷² Such diversity “can lead to widely diverging results, especially if the ratio is determined on a book value basis [...] instead of a market value approach looking at the future cash flows of the companies”.⁷³

Given the variety of approaches among Member States with respect to valuation rules applicable to the share exchange ratio, it would be beneficial to establish a common approach as a mean of harmonisation on the EEA level. Member States may be given a choice, for instance, between 2 valuation methods. Therefore, countries involved in active economic activity with each other will be given a chance to adopt the same valuation methods. It is also important that within the single cross-border merger, two participating Member States use the same approach in order not to create additional barriers to the cross-border merger process. This would greatly facilitate the asset’s valuation procedure,⁷⁴ hence, the share exchange ratio determination procedure, as they are interconnected with each other.

The third risk that can be identified is that cross-border merger can have value destroying effect. The idea of conducting a cross-border merger may be a bad business decision, taken without consistent consideration. This, as a consequence, can lead to a situation where the asset base in a cross-border merger may not increase but shrink, especially in the case of an over-debted company merging with a sound entity.⁷⁵ This risk affects the shareholders of both merging companies to the

⁶⁹ Article 125 paragraph 3 of Directive 2017/1132, *supra note*, 27.

⁷⁰ Article 126a paragraph 6 of Directive 2017/1132, *supra note*, 27.

⁷¹ European Commission: Directorate General for Parliamentary Research Services of the Secretariat of the European Parliament and Emmanuela Truli, *Ex-post analysis of the EU framework in the area of cross-border mergers and divisions*, (Brussels: Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament, 2016), cited page 49, doi:10.2861/246369.

⁷² Bech Bruun and Lexidale, *supra note*, 19: 66.

⁷³ Winner, *supra note*, 9: 66.

⁷⁴ Schmidt, *supra note*, 44: 23.

⁷⁵ Winner, *supra note*, 9: 50.

same extent.⁷⁶ The consequence of this risk lies not in the probability of being governed by the law shareholders are unfamiliar with or that the corporate governance will change, but in financial repercussions. For instance, the share value may be lower as a result of a decrease in the asset base, or the shareholder's ownership percentage may be diluted. First and foremost, in this case, shareholders are protected by the right to oppose the potentially value-destroying cross-border merger by the means of voting against it.

To sum up, **this subchapter** introduces the potential risks for shareholder rights in cross-border mergers. Among them are that first, the cross-border merger may result in a disadvantageous change of applicable law for shareholders; second, the share exchange ratio may be inadequately set; and third, possible value-destroying effect on merging companies.

⁷⁶ *Ibid.*, 62; also Jessica Schmidt, "The Mobility Aspects of the EU Commission's Company Law Package: Or – The Good, the Bad and the Ugly", *European Company Law* 16, no. 6 (2019): 16.
<https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019003>

2. GENERAL OVERVIEW OF MECHANISMS PROTECTING SHAREHOLDER RIGHTS IN CROSS-BORDER MERGERS IN THE SINGLE MARKET

The provisions on cross-border mergers contained in the Directive include mechanisms that protect shareholders' rights against the perils analysed in Chapter 1. Among them are the right to dispose of their shares for adequate cash compensation (also known as exit right), the right to dispute the share exchange ratio and claim cash payment. Protection is also insured by the majority necessary for approval of cross-border merger and by the right to information on cross-border merger expressed in disclosure of certain documents, merger plan, as well as management's and independent expert's reports. The existence of such protection tools is inevitable because shareholders are unable to protect their interests by challenging the approval of cross-border mergers on the basis that the merger ratio or cash compensation has been inadequately set.

2.1. Right to Information and Right to Vote on Approval of the Cross-Border Merger as Tools for Protection of Shareholder's Rights

The first protection tool for the shareholders' rights in the context of a cross-border merger is the right to information. The previous regime, contained in the CBMD, was mainly based on protection by means of information, where shareholders protected their interests, being able to vote on the approval and holding information from draft terms of cross-border merger and management/expert reports.⁷⁷ Unlike the exit right and the right to dispute share exchange ratio, which belongs to the group of economic rights of the shareholders, the right to access information constitutes its group of rights – information rights. Every shareholder all over EU Member States has irrebuttable right to receive a certain degree of information from the company. This right does not depend on the types of shares the shareholder holds, their quantity, or even whether he holds any voting rights at all.⁷⁸

The governance and information rights are closely connected to each other.⁷⁹ The right to information within cross-border mergers may be perceived as a basis for the execution of other protection tools since only by possessing the information on the share exchange ratio in a timely manner are shareholders able to successfully dispute it. In addition to this, they cannot properly exercise their right to vote on the approval of cross-border merger if they lack adequate information. Therefore, the rationale behind the right to information is to provide the shareholders of the company with sufficient information in order to ensure that, on the one hand, a decision on

⁷⁷ Schmidt, *supra note*, 28: 253.

⁷⁸ Bartkus, Gintautas and Belicka, Daina and Civilka, Mindaugas and Conac, Pierre-Henri and Teichmann, Christoph and Teichmann, Christoph and Lambooy, Tineke and Hannigan, Brenda, *Study on Minority Shareholders Protection*, (Luxembourg: Publications Office of the European Union, 2018); cited p.152, <http://dx.doi.org/10.2139/ssrn.3225130>

⁷⁹ Alavi and Khamichonak, *supra note*, 7: 315.

the approval of a cross-border merger is taken in a “fair, objective and non-discriminatory manner”⁸⁰, and on the other hand the shareholders possess exhaustive documents for informed decision-making and rights enforcement purposes.

According to Directive 2017/1132, the right to information is still granted by the publication of common draft terms, where companies, for the first time within the merger process, state the most important information for the shareholders related to share exchange ratio, cash compensation for dissenting shareholders as well as information on evaluation of assets and liabilities being transferred, etc.⁸¹ Merger plan shall be published for shareholders at least one month before the approval of cross-border merger ensuring that they will have sufficient time to familiarise themselves with contained information. Besides this, in a narrower sense, information within cross-border mergers also comprises two elements: the administrative or management body report for members⁸² and the independent expert report.⁸³ Those are procedural requirements aimed at the protection of the shareholder’s interests.

The first element is a report of the administrative or management body for members. The report must consist of two parts: the section for members and the section for employees – either separately or together,⁸⁴ or there must be separate reports for members and employees. Such division has been controversially assessed in the scientific literature. Viewed from one standpoint, it is welcomed that parts for members and employees can be divided into two independent reports.⁸⁵ Such a division allows them to waive the requirement to draw up the report for members⁸⁶ at the same time not influencing the report for employees. From another perspective, it is considered that a single report for both members and employees would more clearly address relevant issues.⁸⁷

Reconciling the two approaches, the possibility of a choice for merging companies as to the form of the report shall be perceived to be beneficial. At the same time, the drafting of two reports seems more appropriate, taking into consideration two moments. First, despite the shareholders and employees being both groups of stakeholders, they are completely in different groups from the point of view of the affecting rights, they need to possess different scopes of information. Second, the possibility to waive the section of the report for members does not

⁸⁰ Recital 10 of the Preamble of Directive 2019/2121, *supra note*, 1.

⁸¹ Article 122 of Directive 2017/1132, *supra note*, 27.

⁸² *Ibid.*, Article 124.

⁸³ *Ibid.*, Article 125.

⁸⁴ Such a possibility stipulated by the Article 124 paragraph 2 (1) of Directive 2017/1132, *supra note*, 27.

⁸⁵ Schmidt, *supra note*, 28: 245.

⁸⁶ Such a possibility stipulated by the Article 124 paragraph 4 of the Directive 2017/1132, *supra note*, 27.

⁸⁷ Thomas Papadopoulos, “Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121”, *European Business Law Review (Kluwer)*, Volume 34, Issue 5, 2023: p. 13. <https://ssrn.com/abstract=4566841>

seem to constitute a threat to shareholders' rights protection, at least owing to the fact that they have to decide themselves to do so (moreover, it should be agreed unanimously by all shareholders). The waiver may facilitate the process of the cross-border merger for a company, as it allows for saving resources related to the drawing of the report.

The drawn-up report for members is aimed at explaining and justifying the legal and economic aspects of the cross-border merger, and the implications of the cross-border merger for the future business of the company. As an example, in the common section it may be explained and reasoned how the cross-border merger can facilitate the operational activity of the company by, for instance, reducing certain costs or sharing resources between two or more companies; that the cross-border merger will allow access new market and a wider range of customers; that after the cross-border merger the company will settle at the jurisdiction with more favourable tax or intellectual property legislation.

Firstly, the section for members shall explain the cash compensation and the method used to determine the cash compensation.⁸⁸ The cash compensation refers to the payment granted to the shareholders after exercising the exit right. This is the amount of money dissenting shareholders are to be paid by the company in exchange for their shares when exiting the company. The methods used refer to the information on what exact approach was used in order to determine the value of the shares that shareholders hold. It shall be noted that among the Member States, two different types of valuation methods are common: the fair value method (is based on the current market value of an asset)⁸⁹ and the book value method (based on looking at the assets of the companies, even based on historical costs).⁹⁰

Secondly, the share exchange ratio which refers to the rate at which the shares of the transferring company will be exchanged for the shares in the acquiring company engaged in the cross-border merger.⁹¹ The methods used refer to the approaches that were used to evaluate the ratio. Thirdly, the implications of the cross-border merger for members.⁹² This includes informing the shareholders of the merging companies on their position in the acquiring company in general.⁹³ Lastly, the rights and remedies available to members in accordance with article 126a. This includes informing shareholders on the possibility of using the right to dispose of their shares in case they wish to exit a company and the right to dispute the share exchange ratio in case they wish to remain in a company. It is especially emphasised on the

⁸⁸ Article 124 paragraph 3(a) of Directive 2017/1132, *supra note*, 27.

⁸⁹ Bech Bruun and Lexidale, *supra note*, 19: 66.

⁹⁰ Winner, *supra note*, 9: 66.

⁹¹ Article 124 paragraph 3(b) of Directive 2017/1132, *supra note*, 27.

⁹² *Ibid.*, Article 124 paragraph 3(c).

⁹³ "Frequently Asked Questions: New Company Law Rules", European Commission, accessed on 31 October 2024, https://ec.europa.eu/commission/presscorner/detail/pt/memo_18_3509

necessity to include information about the shareholders' right to exit the company.⁹⁴ I deem that the inclusion of this information is highly beneficial for shareholders, as based on these indicators, the latter may assess their position in the acquiring company. For example, the share exchange ratio may be established at level 0.9, meaning that certain shareholder will possess a proportionally lower quantity of shares after a cross-border merger takes effect, or *vice versa*.

Even though information rights are not generally linked to types of shares or the position of shareholders within a company,⁹⁵ in some cases, the right to information is linked to a portion of share capital. Therefore, it is worth noting that the protection of shareholders on a national level can also be ensured through appointing experts (auditors) on their request. This right is available for minority shareholders, given that in order to be eligible to initiate a procedure, they have to possess a certain portion of share capital.

For instance, Germany safeguards its shareholders by stipulating that a special audit can be initiated by the shareholders, who possess one-hundredth part of the share capital. Such audit, among others, may examine the governance of the company by management, review of financial statements;⁹⁶ in Belgium those possessing ten per cent of the share capital may appoint an audit to check the company's financial statement to see if there's a risk of serious harm to the interests of the company.⁹⁷ The provisions on this special audit may vary across Member States with regard to procedural requirements, but they are created to promote accountability and transparency in relations between a minority shareholder and a company. Even given the fact that it is the shareholders who initiate the audit, the audit process itself protects the company rather than the shareholders.⁹⁸

The information required by article 124 has been increased significantly with the amendments made by Directive 2019/2121.⁹⁹ As a matter of fact, from the wording of article 124 paragraph 3¹⁰⁰ it can be deduced that the list contained in the latter article is non-exhaustive. Therefore, taking into account the minimum harmonisation nature of the Directive's provisions, the Member States may provide for more matters that are about to be explained in the members' section of the report. Such stipulation is also welcomed, as the

⁹⁴ Recital 13 of the Preamble of Directive 2019/2121, *supra note*, 1.

⁹⁵ Bartkus et al., *supra note*, 78: 152. See also fn. 78.

⁹⁶ Sections 142 (1)(2) of German Stock Corporation Act (*AktG*). "Aktiengesetz", Bundesministerium der Justiz Bundesamt für Justiz, accessed 8 November 2024, <https://www.gesetze-im-internet.de/aktg/BJNR010890965.html#BJNR010890965BJNG000300308>

⁹⁷ Article 5:106 of Belgian Code on Companies and Associations (BCCA). "Code des sociétés et des associations." Service Public Federal Justice. Accessed 12 November 2024.

https://www.ejustice.just.fgov.be/cgi_loi/article.pl?language=fr&lg_txt=f&type=&sort=&numac_search=&cn_search=2019032309&caller=SUM&&view_numac=2019032309dx2019032309f#list-link-1

⁹⁸ Eva Micheler, *Company Law. A Real Entity Theory*, (New York: Oxford University Press, 2021), 221-222.

⁹⁹ Davies et al., *supra note*, 34: 12.

¹⁰⁰ "The section of the report for members shall, *in particular*, explain the following [...]."

companies shall be free to what additional information they are about to include in the report. It depends on the size of the companies in question, their activity and the number of shareholders.

The second element of the right to information is an independent expert's report.¹⁰¹ The expert's report as a protection tool for shareholders is important because it is focused on the assessment of the cash compensation and share exchange ratio. Additionally, special overarching attention is paid to the valuation of the methods used to arrive at the cash compensation and share exchange ratio and to the consideration of the adequacy of such methods. Enhanced examination of the methods proves that provisions on independent expert's report were aimed at "the protection of the shareholders from dilution".¹⁰² To assess whether the cash compensation and the share exchange ratio are adequate, the independent expert is about to examine (a) the market price of the shares in the merging companies prior to the announcement of the merger proposal or (b) the value of the companies excluding the effect of the proposed merger¹⁰³. I consider that the rationale behind both approaches is to exclude from the valuation effect that the decision to conduct a cross-border merger poses on the market price of shares and the value of the merging companies.

Secondly, the expert's report shall indicate the method/s used to determine the cash compensation and the share exchange ratio, the value arrived at using such methods and state whether those methods used are adequate. In some cases, companies from different jurisdictions may use different valuation methods based on their national tradition. While this is an unwanted condition, an expert shall also indicate whether such use of different methods was justified. In such a case, the drawing comparison between the different methods used is inevitable.¹⁰⁴ As far as the Directive does not harmonise on the valuation methods of the share exchange ratio and cash compensation in cross-border mergers, different Member States apply diverse methods as established in their legislation or legal traditions.¹⁰⁵

Such an important matter should also be harmonised by the Directive on the EEA level. While the reports are important protection mechanisms, the results of the valuation constitute a basis for drawing those reports. Different valuation methods may lead to different values, therefore distorting the share price for both of the companies. The Directive may, for instance, include a few valuation methods and provide that a Member State are welcome to choose one of them. The unwillingness of companies to use some of the methods may be related to the

¹⁰¹ Article 125 of Directive 2017/1132, *supra note*, 27.

¹⁰² Papadopoulos, *supra note*, 87: 16.

¹⁰³ Article 125 paragraph 3 of Directive 2017/1132, *supra note*, 27.

¹⁰⁴ Papadopoulos, *supra note*, 87: 16.

¹⁰⁵ Truli, *supra note*, 71: 49.

established tradition related to one of the approaches. Member States, however, shall continue to use their traditional valuation methods at the level of domestic mergers and use a unified approach when it comes to cross-border mergers.

It is evident that the independence of an expert from companies and respecting authorities depends on the reliability of the whole report and, as a consequence, the profitability of the cash compensation or share exchange ratio. Therefore, special attention is paid to the requirements granting the independence of an expert.¹⁰⁶ As far as each of the merging companies appoints the expert (either as a natural or as a legal person), it is in the competence of the Member State to provide rules regulating the independency criteria.¹⁰⁷ The Directive sets out minimum requirements, among which absence of conflict of interest with the company¹⁰⁸; impartiality and objectivity of the expert's opinion; the expert's opinion should be given "with a view to providing assistance to the competent authority"¹⁰⁹ based on the independence and impartiality requirements and professional standards. The Directive gives a lot of attention to the requirements of an independent expert, which is to be highly beneficial.

Given this, Member States are obliged to opt for the civil liability of the independent expert. Depending on the law of respecting Member State, for his/her misconduct, the expert may be liable before the merging companies, their shareholders and creditors, third persons that suffered losses. I agree with the point of view expressed in the literature that the range of applicable liability shall be narrowed, as civil liability towards every mentioned person is not justified.¹¹⁰ The overall assessment of the presence of civil liability for experts is positive¹¹¹, as it would provide for more objectivity and impartiality of independent experts. It is worth noting that among Member States, the approach to make an expert a subject of civil and sometimes criminal liability was already present. This is common practice, but the stipulation of such requirement by the Directive had once more emphasised its importance.

All the procedural elements of the expert's report play an important role in ensuring the shareholders' coherent protection. The correctness of the definition of cash compensation and share exchange ratio affects the further use of the right to exit the company and the right to

¹⁰⁶ Article 133a of Directive 2017/1132, *supra note*, 27.

¹⁰⁷ The Recital 14 of the Preamble of Directive 2019/2121, *supra n.1*, however, recommends that Member States shall take into account the provisions of the Articles 22 and 22b of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (OJ L157, 9.6.2006, p. 87). <https://eur-lex.europa.eu/eli/dir/2006/43/oj>

¹⁰⁸ Neither expert him/herself, not the legal person on whose behalf the expert is operating shall have conflict of interests with the merging company, they are preparing report for.

¹⁰⁹ Article 133a para 2(b) of Directive 2017/1132, *supra note*, 27.

¹¹⁰ Schmidt, *supra note*, 28: 246.

¹¹¹ *Ibid.*; also Papadopoulos, *supra note*, 87: 16-17.

dispute the share exchange ratio. Moreover, the independence of the expert, as well as the provided option of his civil liability in case of misconduct, contributes to how accurately and impartially the expert will assess these indicators. On top of that, appointing an independent expert report is an important safeguard that lies in the expert's role as an objective third party responsible for assessing the value. Therefore, this value is neither dictated by the company nor by shareholders, but rather is estimated based on appropriate methods. It, however would be beneficial that a common approach concerning valuation methods would be established on the Directive level, at least given the possibility to choose among several of them.

The following protection tool for the shareholder's rights in the context of a cross-border merger is **the right to vote on the approval of a cross-border merger**.¹¹² From a broader perspective, the right to vote in terms of corporate law is one of the key membership rights. It allows shareholders to exercise an influence over the voting procedures¹¹³ by either adopting or blocking decisions on the fundamental matters in a company. Therefore, the right to vote constitutes a group of governance rights which provide an ability to control and govern a company. The importance of the right to vote is that shareholders have the opportunity to protect themselves from an unfavourable, value-destroying cross-border merger and, therefore, from its following dangerous implications.

For the shareholders to successfully use the right to vote on the approval of a cross-border merger, it is necessary to exercise the right to information, which was discussed previously in the research. It follows from the mere nature of the right to vote that the shareholder has to possess a certain degree of information on the matter he/she is going to vote for. It will ensure an informed decision-making process, as well as the influence on the terms' alignment with the shareholder's interests. Therefore, voting on the cross-border merger is not possible without previous exercising of the right to information, i.e. familiarising themselves with the management body and independent expert reports. Moreover, the shareholders must vote on the adjustment of the corporate constitution and the rest of the statutory documents of the company, which are not less important for the determination of shareholder position within a company.

The provisions on the required majority necessary for approval of the cross-border merger by general meeting constitute by itself a protection means for the shareholders' rights.¹¹⁴ Although article 126 of the Directive, which covers approval of the cross-border

¹¹² By "the approval of cross-border merger", as it formulated in this part of research, it is meant "voting on the approval of the common draft terms of the cross-border merger on general meeting", hereinafter referred as the approval of the cross-border merger.

¹¹³ Bartkus et al., *supra note*, 78: 126.

¹¹⁴ Davies et al., *supra note*, 34: 12.

merger, was recently amended by Directive 2019/2121, it still lacks harmonisation concerning the majority required for the approval. The Recital of the Preamble advises that the required majority for the vote, opted by a Member State, should be sufficiently large in order to ensure that the decision is taken by “a solid majority”.¹¹⁵ Indeed, a qualified majority guarantees that important decisions, such as approval of the cross-border merger, will be adopted with the approval of a substantial majority of shareholders, allowing them to block certain decisions they find unfavourable for their interests.¹¹⁶

The existing gap can be filled by addressing the rules on domestic mergers.¹¹⁷ Hence, it requires a majority of not less than 2/3 (two-thirds) of the votes attached either to the shares or to the subscribed capital represented needed for approval of a merger by a general meeting. This provision will apply indirectly to cross-border mergers of public limited liability companies based on Articles 121 para. 1 subpara. b and 121 para. 2.¹¹⁸ A simple majority of votes may be sufficient when at least half of the subscribed capital is represented, which also applies indirectly only to cross-border mergers of public limited liability companies on the basis of Articles 121 para. 1 subpara. b and 121 para. 2.¹¹⁹

Among Member States, different approaches are used with regard to a majority needed for the adoption of the general meeting’s decisions¹²⁰, which, however, tend to opt for a greater majority ratio up to unanimity concerning certain decisions. Most EU Member States require a qualified majority for the decision on approval of the cross-border merger. In some Member States, such as Germany, Ireland and Belgium, the majority of 3/4 (three-quarters) votes is required.¹²¹ Hence, the right to vote on the approval of cross-border mergers, being central to corporate governance, provides shareholders with the possibility to prevent transactions potentially harmful to their rights and interests. For the most part, among Member States, a qualified majority of not less than 2/3 (two-thirds) of the votes is needed in order to reach approval on the common draft terms. For instance, the European Model Companies Act propose the majority in number, representing 2/3 in value, to approve a cross-border merger plan.¹²²

¹¹⁵ Recital 16 of the Preamble of Directive 2019/2121, *supra note*, 1.

¹¹⁶ Bartkus et al., *supra note*, 78: 126.

¹¹⁷ Article 93 paragraph 1 of the Directive 2017/1132, *supra note*, 27.

¹¹⁸ Papadopoulos, *supra note*, 87: 17.

¹¹⁹ *Ibid.*, 18.

¹²⁰ Bartkus et al., *supra note*, 78: 126-127.

¹²¹ Section 50(1) of German Transformation Act (*UmwG*), *op.cit.* (fn. 187), and Section 191(3) of Irish Companies Act 2014 *op.cit.*, (fn. 245).

¹²² Andersen, Paul Krüger and Andersson, Jan Bertil and Bartkus, Gintautas and Baums, Theodor and Clarke, Blanaid J. and Conac, Pierre-Henri and Corbisier, Isabelle and Daskalov, Waltschin and Engrácia Antunes, José and Fuentes, Mónica and Giudici, Paolo and Hannigan, Brenda and Kalss, Susanne and Kisfaludi, Andras and de Kluiver, H. J. and Opalski, Adam and Patakyova, Maria and Perakis, Evangelhos Emm. and Porkona, Jarmila and Roest, Joti and Sillanpää, Matti J. and Soltysinski, Stanislaw and Teichmann, Christoph and Urbain-Parleani, Isabelle and Vutt,

The difficulty with an implication of the right to vote may be revealed in the fact that shareholders tend to adopt a passive position in a company, particularly in relation to voting on important matters. For instance, the RiskMetrics Group¹²³ in their study indicated that many shareholders do not perform their monitoring responsibilities, do not dedicate enough time to exercise their rights properly and resemble “absentee landlords”¹²⁴ because of this approach. The desire to take an active role may be discouraged by the fact of complicated exercising of certain rights or if it is not possible to vote on the approval within electronic means or via proxy. Such circumstances may lead to a situation where it is hard for a company to gain the required majority for voting, hence violating the interests of those minority shareholders who are interested in voting and taking active positions. Moreover, not once the right to vote on the approval was addressed as formal,¹²⁵ which may be related to the fact that, in some cases, it is rather a procedural safeguard, than a substantive mechanism protecting shareholder’s rights. Nevertheless, I support the view that minority shareholder protection is foremost established via the majority needed for the approval of the cross-border merger.¹²⁶

As a conclusion to this subchapter, it shall be stated the following. The directive provides overarching protection through information protecting shareholder rights, which constitutes a basis for the execution of other protection tools and informed voting on the approval of cross-border mergers. It is indeed beneficial approach that management report may be drafted separately for shareholders without link to employees. The provisions on the independence and civil liability of an expert greatly contribute to the reliability of an expert’s report. Protection ensured by the majority is needed for approval of cross-border mergers. The uncertainty, however, remains as to the valuation methods used for arriving at share price and share exchange ratio, and it would be beneficial if the Directive establishes a few options available for Member States to choose from. The requirement on the required majority for approval of draft terms of cross-border merger shall be included in Title II Chapter II of Directive 2017/1132, and not just as a rule for domestic mergers, as it is now the case.

To sum up, this subchapter introduces the right to information and the right to vote on the approval of cross-border merger. It is substantiated that they are complementary, as the

Andres and Sørensen, Karsten Engsig and Winner, Martin and De Wulf, Hans, “European Model Company Act (EMCA). First Edition, 2017,” *Nordic & European Company Law Working Paper* No. 16-26, section 13.27 p. 313, <https://ssrn.com/abstract=2929348>

¹²³ RiskMetrics Group, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States*, 2009, p. 12, https://www.guberna.be/sites/default/files/public/2020-03/study_on_monitoring_and_enforcement_practices_in_corporate_governance_in_the_member_states.pdf

¹²⁴ Speech by Lord Myners delivered on April 21st, 2009 at the conference at Association of Investment Companies **quoted in** RiskMetrics Group, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States*, 2009.

¹²⁵ Schmidt, *supra note*, 28: 253.

¹²⁶ Davies et al., *supra note*, 34: 12.

possession of sufficient information obtained from the management body and independent expert report constitutes a prerequisite to informed voting on cross-border merger. Moreover, the right to vote against a CBM serves as a safeguard for shareholders, protecting them from one of the potential risks associated with the value-destroying effect.

2.2. Exit Right as a Tool for Protection of Shareholder's Rights

The second tool for the protection of shareholder's rights in cross-border mergers, which will be analysed, is the right to dispose of shareholder's shares against adequate cash compensation, or in other words – the exit right. This right is introduced in Article 126a paragraph 1 of Directive 2017/1132. The Article 126a (1) states, that

Member States shall ensure that at least the members of the merging companies who voted against the approval of the common draft terms of the cross-border merger have the right to dispose of their shares for adequate cash compensation [...], provided that as a result of the merger they would acquire shares in the company resulting from the merger which would be governed by the law of a Member State other than the Member State of their respective merging company.

First, according to this provision, the exit right is given to “members of the merging companies”, meaning the two companies – transferring and acquiring. As it was discussed earlier, the shareholders of the acquiring company do not suffer from a change of applicable law. Therefore, there exists a point of view among scientists that the exit right should not be granted to the shareholders of the acquiring company and that such a possibility is “excessive”.¹²⁷ Germany can be taken as an example, where an exit right is only granted to the members of the transferring company.¹²⁸ Even though for the acquiring company an applicable law does not change, the membership rights of the company are still affected, and financial losses can be faced as a result of cross-border mergers.¹²⁹ The majority shareholders should not be able to force minority shareholders to accept a disadvantageous situation that may appear as a result of the change of applicable law – a resulting company with different characteristics, structure and functioning than the merging company.¹³⁰ For instance, in the European Model Companies Act 2017, it is provided that in cross-border mergers, the exit right for dissenting shareholders shall be mandatory.¹³¹ In light of the stated above, the exit right shall be granted to shareholders of every merging company if they will be subject to a change of applicable law (as is the case with a merger by the creation of a new company) or the repercussion of the cross-border merger will change their rights to the

¹²⁷ *Ibid.*, 13.

¹²⁸ Section 313 of German Transformation Act (*UmwG*), *op.cit.*, (fn. 187).

¹²⁹ Schmidt, *supra note*, 28: 255-256.

¹³⁰ Thomas Papadopoulos, "Protection of shareholders in cross-border mergers: the new harmonized rules" *European Company and Financial Law Review* 18, no. 6 (2021), cited p.7, <https://doi.org/10.1515/ecfr-2021-0038>.

¹³¹ Andersen et al., *supra note*, 122: 315-316.

great extent (e.g. with respect to voting rights or access to information) or provoke financial loss, as it would put them on an equal level of protection.

Secondly, it is stipulated that at least the members who voted against the approval of the common draft terms of the cross-border merger have the right to dispose of their shares. By this, the exit right is granted to the shareholders who can vote – who have voting rights. Additionally, it is important to pay attention to the wording of the Article, which contains “at least”. As far as the Directive contains minimum harmonisation provision, it is up to the Member States to allow additional protection for the shareholders, in this case, for those who do not have voting rights. It seems logical, as the fact of absence of voting rights prevents such shareholders from voting in general against the approval of the common draft terms of the cross-border merger. Therefore, they cannot express disagreement by the means of voting, while at the same time, they are equally affected by the consequences of cross-border merger as those shareholders who hold the right to vote.

As it was mentioned, it is up to Member States to extend the categories of shareholders who could benefit from the possibility to dispose of their shares. In the scientific discussion on this topic, it is proposed that among such categories could be passive shareholders, shareholders who take part in the general meeting but abstain from voting, or shareholders who were absent/not present and did not participate in the general meeting.¹³² Directive 2019/2121 itself in Recital 18 stipulates that additional protection may be granted for members for whom there would be no change of applicable law but for whom certain rights would change due to the operation.¹³³

The relevant point is that despite the Directive provides for minimum harmonisation, it would be wrong to overextend the exit right to excess categories of shareholders, especially for every shareholder in the acquiring company or for those who took a passive position on purpose.¹³⁴ I agree with this position and consider that such overextension would be against the spirit of the provision contained in Article 126a. Moreover, it should be pointed out that the protection should be consistent and provide a comprehensive regime for the shareholders; therefore, overextending the categories of shareholders eligible to exercise exit right would be not just against the spirit of law but also dangerous for the company (and therefore for remaining shareholders), as will put them under serious liquidity risk.

The mere fact that a condition of acquiring shares in a company that would be governed by the law of another Member State present in Article 126a states that the legislator confirms that in a cross-border merger not every shareholder is subject to a change of law, as for example it is

¹³² Papadopoulos, *supra note*, 130: 7.

¹³³ Recital 18 of the Preamble of Directive 2019/2121 amending Directive 2017/1132, *supra note*, 1.

¹³⁴ Francisco Garcimartin and Enrique Gandia, "Cross-Border Conversions in the EU: The EU Commission Proposal," *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019), p. 43.

in cross-border conversion. Hence, the legislator inserted the condition mentioned above as a protection mechanism for shareholders, who may face dangerous situations “whereby the law applicable to their rights changes”.¹³⁵ As was mentioned in Chapter 1 of this thesis, a change in *lex societatis* may lead to undesirable changes in the legal status of minority shareholders, for instance, to a change in voting rights, right to information, and the system of a company debt liability. A new *lex societatis* applicable to the shareholders represents a serious change of the original conditions.¹³⁶ From a practical point of view, the difficulties may arise also from the language barriers, the limited knowledge of the foreign legal system, and the limited information on the company’s activities due to its headquarters being abroad.¹³⁷ The exit right becomes a tool for achieving a balance between the shareholder’s interests not being subject to the new *lex societatis* and the company’s interest in a successful cross-border merger.¹³⁸

The legislator places time limits for expressing the intention to exercise the shareholders’ exit right. It is recommended that the time be limited to a short period after the general meeting, as it would allow the companies to approximate the financial situation.¹³⁹ For example, Belgium made use of this provision, as the BCCA require pre-notification of the company on the shareholder’s decision to exit a company.¹⁴⁰ I agree that it is vitally important that shareholders, in a timely manner express their desire to exit. It would allow the company to estimate how many shareholders are about to leave and what amount of payment the acquiring company is about to face. If the quantity is too high, the company may be forced to step back with its intention to cross-border merge.

The cash compensation paid for the shareholders’ shares has to be “adequate”.¹⁴¹ It not only shall be included in the common draft terms of the cross-border merger, but the adequacy of the latter is to be examined by the expert and included in the report, as his/her opinion. The remark here has to be made, as the valuation methods used for the determination of the share exchange ratio and cash compensation have to be different. As it is emphasised in the doctrine, the need for different valuation methods for the calculation of the share exchange ratio and the cash compensation is necessary because a shareholder who disagrees with the cross-border merger, rejects the share exchange ratio and decides to dispose of his shares and to exit the company, must

¹³⁵ Recital 18 of the Preamble of Directive 2019/2121 amending Directive 2017/1132, *supra note*, 1.

¹³⁶ Benedetti, *supra note*, 13: 1001.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Knapp, *supra note*, 10: 67.

¹⁴⁰ Article 12:116/1 para.1 (3) of BCCA.

¹⁴¹ Article 126a paragraph 1 of Directive 2017/1132, *supra note*, 27.

not get profit from the cash compensation.¹⁴² This is also called “prohibition against post-acquisition gains”.¹⁴³

The essence of this principle is that during the cross-border merger the value of the company may rise, hence shareholder cannot benefit from a cross-border merger with which he/she does not agree. Moreover, the use of different valuation methods is stipulated in Article 125 paragraph 3 subparagraphs (a) and (b). First of all, it is stated that the expert shall assess the market price of the share “prior to the announcement of the merger proposal” or shall consider “the value of the companies excluding the effect of the proposed merger”. Then, the methods used to determine the cash compensation proposed and to arrive at the share exchange ratio proposed are divided into subparagraphs (a) and (b) accordingly, which emphasise the statement that different valuation methods have to be used. Therefore, I agree that for shareholders, an expert review of the adequacy of the cash compensation in case of a cross-border merger serves a function of the protection tool, as in this case, the assessment of the adequacy of cash compensation is conducted in an impartial manner by independent professionals.¹⁴⁴

Member States might also require shareholders to indicate, together with that declaration or within a specific time limit, whether they intend to dispute the cash compensation offered and claim additional cash compensation.¹⁴⁵ This provision is, however, unclear as to what position a shareholder will have in a case when he/she does not declare the intention to dispute cash compensation together with the declaration of withdrawal and further decides to dispute it anyway. The company would not be able to preclude shareholders from applying to the Court in order to dispute cash compensation; therefore, it can be deduced that a requirement to pre-inform a company of one’s intention to dispute cash compensation has formal repercussions. To my mind, in case a Member State will make use of this provision, as is the case with Belgium, it would create additional safeguard for a company, as it would allow to better estimate the costs of cross-border merger, as claims for additional cash compensation may be detrimental for a financial situation of the merging companies.

Additionally, Directive stipulates¹⁴⁶ that the cash compensation is to be paid no later than two months after the cross-border merger takes effect. The implication of a relatively long period may be beneficial for a company, with the purpose of finding recourses needed to fulfil its obligation before shareholders. For comparison, Germany established that cash compensation

¹⁴² Papadopoulos, *supra note*, 130: 9.

¹⁴³ Benedetti, *supra note*, 13: 1003.

¹⁴⁴ *Ibid.*, 1007.

¹⁴⁵ Recital 19 of the Preamble of Directive 2019/2121 *supra note*, 1.

¹⁴⁶ Article 126a paragraph 3 of Directive 2017/1132, *supra note*, 27.

shall be paid 2 weeks after the cross-border merger took effect, while countries like Ireland¹⁴⁷ and Belgium¹⁴⁸ implemented a 2-month time frame. Overall, the harmonisation of this time frame is highly beneficial for the execution of cross-border merger. Shareholders will be more aware of the duration of the transaction, and the acquiring company that is subject to make a payment won't be able to put such this matter on a shelf.

Although it is stipulated¹⁴⁹ that the shareholders have the exit right (the right to dispose of their shares), it is not specified to whom they can sell them. One can address Recital 14 of Directive 2019/2121, where it is said, “the offer of cash compensation made by the company to those members who wish to exit the company”. Here, it can be understood that the Directive requires the merging companies to offer and pay cash compensation to the shareholders wishing to exercise the exit right. As far as in cross-border mergers (both by acquisition and creation of a new company), there is only one surviving company – the burden of paying the cash compensation belongs to it.¹⁵⁰

The problematic aspect related to exit right and, in particular, to the payment of cash compensation is that it “will lead to cash outflow, which can be detrimental to a company”.¹⁵¹ The size of the outflow can reach up to 50% of the votes minus one vote at each of the merging companies, and the maximum cash outflow can be estimated on the basis of this maximum number of minority shareholders wishing to exit the company.¹⁵² If a company is unable to pay its obligations (meaning cash compensation) due to a high number of withdrawing shareholders, the only choice it has is to cancel the decision to conduct a cross-border merger.¹⁵³ To avoid this situation, in doctrine, it is proposed to limit the time for minority shareholders to exercise any rights to a short period after the general meeting so that the merging companies will know at an early stage what the position is likely to be.¹⁵⁴ The company may limit the amount of shareholders, being able to exercise the exit right. While this approach is beneficial for the solvency of the company, it may tackle the rights of shareholders, as in this case, it is unclear which of the dissenting shareholders will be granted the possibility to use their exit right if the quantity reaches a threshold. Lastly, as was stated slightly before, the one-month period seems to be an appropriate time frame in relation to this issue.

¹⁴⁷ Regulation 37 (3) of Statutory Instrument No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023 (Regulation 233/2023). “S.I. No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023”, *“Iris Oifigiúil” of 26th May, 2023*, Irish Statute Book, accessed on 5 November 2024, <https://www.irishstatutebook.ie/eli/2023/si/233/made/en/print>

¹⁴⁸ Article 12:116/1 para.1 (3) of BCCA, *op.cit.*, (ft. 284).

¹⁴⁹ Article 126a paragraph 1 of Directive 2017/1132, *supra note*, 27.

¹⁵⁰ Winner, *supra note*, 9: 66.

¹⁵¹ *Ibid.*, 68.

¹⁵² Papadopoulos, *supra note*, 130: 1000.

¹⁵³ Benedetti, *supra note*, 13: 1005.

¹⁵⁴ Knapp, *supra note*, 10: 67.

It is stated in scientific sources that the right to cash compensation complements the right of exit.¹⁵⁵ It, however, may cause additional cash outflow liquidity risks. It is possible to minimise those risks by using the Member States discretion concerning *erga omnes* obligation, the time limits for a claim, and cost rules. Concerning cost rules, the allocation of costs may play a role in the willingness of the shareholders to exercise their right to challenge cash compensation. In the case when the costs for a claim are paid by the merging company, the chance that shareholders would exercise their right to are higher than in the case when the shareholders have to pay the costs themselves, which would discourage them from exercising this opportunity.¹⁵⁶

Lastly, shareholders who consider that the cash compensation has not been adequately set are granted the possibility to claim additional cash compensation before the competent authority or body mandated under national law.¹⁵⁷ Recital 20 of Directive 2019/2121 provides that among competent authority can also be either administrative or judicial authority or arbitral tribunals.¹⁵⁸ For instance, in Ireland, shareholders shall apply to the High Court¹⁵⁹, in Germany to the district or regional Court¹⁶⁰, while in Belgium to the President of the Enterprise Court.¹⁶¹ The time limits for the claim for additional compensation shall also be established by respecting Member States, the Directive itself does not contain any time frame, leaving this for unification within the procedural law of the Member States.

It may be established by Member States¹⁶² that the final decision to provide additional cash compensation is valid for all members of the merging company concerned who have declared their decision to exercise the right to dispose of their shares. In other words, it may be possible that the decision has *erga omnes* obligation. From one point of view, the recognition of *erga omnes* obligation may lead to cash outflow, as the costs of the merging company will increase.¹⁶³ I support another point of view that such an obligation shall have a positive effect on fair treatment between minority shareholders,¹⁶⁴ as by having *erga omnes* effect, the Court decision will be applicable to every shareholder in the same position, and the merging company will be forced to pay adequate compensation to them, supporting the principle of equal treatment of shareholders.

In any case, the rationale behind *erga omnes* effect was to minimise the possible correlations with respect to shareholders, the company itself and even the State. From my point of

¹⁵⁵ Benedetti, *supra note*, 13: 1007.

¹⁵⁶ Winner, *supra note*, 9: 70

¹⁵⁷ Article 126a paragraph 4 of Directive 2017/1132, *supra note*, 27.

¹⁵⁸ Recital 20 of the Preamble of Directive 2019/2121, *supra note*, 1.

¹⁵⁹ Regulation 2(1) of the Regulation 233/2023, *supra note*, 147.

¹⁶⁰ Section 2 para. (1) SpruchG, *op.cit.*, (fn. 218).

¹⁶¹ Article 12:116/1 of the BCCA, *op.cit.*, (ft. 284).

¹⁶² Article 126a para. 4 subpara. 2 of Directive 2017/1132, *supra note*, 27.

¹⁶³ Benedetti, *supra note*, 13: 1006.

¹⁶⁴ Mikaloniene and Kolev, *supra note*, 5: 149.

view, it would have a “three-way” aspect, firstly, due to the fact that suing individually can lead to a procedural burden on shareholders, which secondly would put a burden on the judiciary as a consequence of a number of suits and further can lead to different decisions by the court concerning the additional compensation or payment. Finally, it would create a burden for a company that is obliged to pay an aforementioned payment and deal with litigating shareholders.¹⁶⁵

As a conclusion to this subchapter, it shall be stated that the possibility for shareholders to have exit right constitute one of the biggest achievements of the Directive. It serves as a safeguard protecting shareholders against undesirable change of applicable law. The exit right shall be granted to shareholders of two merging companies if they will be subject to a change of applicable law or the repercussion of a cross-border merger will change their rights to a great extent. At the same time, the balance should be maintained in order not to overextend the exit right to the passive shareholders. The shareholder’s intention to exit the company shall be brought forward in a timely matter. The cash compensations and merger ratio shall be evaluated based on different methods with regard to the “prohibition against post-acquisition gains” principle. The right to dispute cash compensation indicated in common draft terms constitutes a second achievement within this protection mechanism, which complements the right of exit. It is beneficial that the Directive provides an option for the Court’s decision to have *erga omnes* effect by this protecting shareholders’ equity.

To sum up, this subchapter introduces the exit right as a major tool protecting shareholder rights, both with the right to claim additional cash compensation, which complements the right of exit. The essence of these rights, procedural moments and the peculiarities, such as *erga omnes* effect of the Court decision, have been assessed. The exit right safeguards shareholders against the peril of undesirable change of applicable law.

2.3. Right to Dispute the Share Exchange Ratio as a Tool for Protection of Shareholder’s Rights

The third tool for the protection of shareholder’s rights in cross-border mergers that will be analysed is the right to dispute the share exchange ratio and claim additional cash payment. This protection tool originates from German law, in particular, corresponding provisions can be found in the German Transformation Act.¹⁶⁶ The share exchange ratio in cross-border mergers stands for a rate at which shares of the transferring company are exchanged for the shares of the

¹⁶⁵ Deutscher AnwaltVerein, “Stellungnahme zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates zur Änderung der RL 2017/1132/(EU) in Bezug auf grenzüberschreitende Umwandlungen, Verschmelzungen und Spaltungen COM (2018) 241, *cited pages 13-14, 28-30.*

https://anwaltverein.de/de/newsroom/sn-31-18-richtlinienvorschlag-com-2018-241-final?file=files/anwaltverein.de/downloads/newsroom/stellungnahmen/2018/dav-sn_31-18.pdf

¹⁶⁶ Paragraph 15 of German Transformation Act (*UmwG*), *op.cit.*, (fn.187).

acquiring company. The Directive itself neither contain the definition of the share exchange ratio nor explains the features of it. Irish legislator, for instance, while transposing the Directive's provisions, defined share exchange ratio as "the number of shares or other securities in any successor company that the common draft terms of a cross-border merger provide to be allotted to members of any transferor company for a given number of their shares or other securities in the transferor company".¹⁶⁷

Therefore, the accuracy of the assessment of each company's share value leads to the adequacy of the share exchange ratio. The essence of this right lies in the granted to the shareholders possibility to benefit from an accurate share exchange ratio. The right discussed is stipulated in Article 126a paragraph 6 of Directive 2017/1132, by stipulating that

Member States shall ensure that members of the merging companies who did not have or did not exercise the right to dispose of their shares, but who consider that the share exchange ratio set out in the common draft terms of the cross-border merger is inadequate, may dispute that ratio and claim a cash payment.

Also the Recital 21 of the Directive 2019/2121 mention the presence of this right in shareholders:

As far as cross-border mergers or divisions are concerned, members who did not have or did not exercise the right to exit the company should, nevertheless, have a right to dispute the share-exchange ratio.

From the analysis of the provision, it can be deduced that the right to dispute the share exchange ratio and claim a cash payment is applicable to two categories of shareholders. The first category is the shareholders, who did not have the right to dispose of their shares (the exit right) but who consider that the share exchange ratio set out in the common draft terms of the cross-border merger is inadequate. This category may also include those shareholders who hold shares without voting rights. The second category is the shareholders who had the right to dispose of their shares (the exit right) but did not exercise it, however, they consider that the share exchange ratio set out in the common draft terms of the cross-border merger is inadequate. This category may include the shareholders who did not vote against approval of common draft terms of the cross-border merger, who were absent, the shareholders who supported the cross-border merger and, as a consequence, decided to remain the shareholder of the acquiring company or to become a shareholder of the acquiring company (in case they were shareholders of the transferring company).¹⁶⁸

¹⁶⁷ Regulation 25 of the Regulation 233/2023, *op. cit.*, (fn. 147).

¹⁶⁸ Papadopoulos, *supra note*, 130: 15.

Nevertheless, both the shareholders of the transferring and the acquiring company fall within the first and the second category, meaning they are offered this right. It is also important to point out that it is not necessary for the shareholders to vote against the approval of the cross-border merger to be able to exercise the right to dispute the share exchange ratio and claim a cash payment.¹⁶⁹ Such an approach shall be considered as advantageous as far as it does not require the shareholders to vote against for the mere reason of being able to exercise the right to challenge the share exchange ratio.

The procedural aspects of the right to dispute the share exchange ratio and claim a cash payment are the following. As stipulated by Directive¹⁷⁰, the proceedings shall be initiated before the competent authority or body mandated under the law of the Member State to which the relevant merging company is subject. Bringing an action to the authority located in the Member State where the company is located is likely to make the proceedings more manageable.¹⁷¹ It is hard not to agree that it would be easier for the shareholders to take part in legal action if it takes place in their country according to the procedural rules the latter are acknowledged with, and I consider such an approach implemented in the Directive to be beneficial for safeguarding the shareholder interests.

Another important matter stipulated by the Directive is that neither initiation of the proceedings related to the challenge of the share exchange ratio, prevent the registration and completion of the cross-border merger, nor the approval can be challenged solely on the grounds that the share exchange ratio has been inadequately set. I deem this provision as an indirect safeguard for shareholders. Challenging the whole approval may lead to costly litigations and delays. Until they are done, neither dissenting shareholders are able to obtain cash compensation nor the shareholders who disagree with the share exchange ratio. The Directive already provides for independent experts, who shall affirm the adequacy of payment in question; hence, it would be excessive to allow challenging the whole merger on the grounds of isolated disagreement.

The problematic aspects relating to procedural provisions touch upon the determination of the shareholders, who would benefit from the positive decision of the competent authority to award cash compensation.¹⁷² In such a proceeding, there is a claimant (or claimants, if other shareholders will join the proceedings initiated by others) who adopts an active position and initiates the proceeding. Member States may extend the effect of the decision about the share exchange ratio onto any members of the merging company concerned who did not have or did not exercise their right to dispose of their shares.¹⁷³ Hence, by giving the decision *erga omnes* effect, the undesirable

¹⁶⁹ Winner, *supra note*, 9: 65.

¹⁷⁰ Article 126a para. 6 of Directive 2017/1132, *supra note*, 27.

¹⁷¹ Knapp, V. *supra note*, 10: 67.

¹⁷² Davies et al., *supra note*, 34: 16 – 17

¹⁷³ Article 126a para. 6 subpara. 2 of Directive 2017/1132, *supra note*, 27.

(from the company's perspective) award may be granted to shareholders, who adopt passive position¹⁷⁴ and free-riding behaviour¹⁷⁵. But I consider that at the same time, if only claimants receive cash compensation or will be allocated additional shares, it will tackle the principle of equal treatment of shareholders and cause dilution of the shareholders who did not dispute the share exchange ratio. Overall, it is doubtful if potentially unfairly obtained payment may tip the scale over equal treatment. In a meanwhile, Member States tend to give the Court's decision *erga omnes* effect.

An additional cash compensation must be paid to shareholders in case it will be decided that the share exchange ratio is inadequate,¹⁷⁶ by the company resulting from the cross-border merger. The Directive provides that the Member States may opt for the possibility to provide shares or other compensation instead of a cash payment. This provision sounds advantageous for a company, as it allows it to avoid the possible cash outflow, which threatens a company as a result of the payment of cash compensation.¹⁷⁷ Therefore, in order not to face liquidity risks, the company resulting from the cross-border merger can allocate shares. It should be noted that excessive allocation of shares may pose additional risk for shareholders, as it will lead to a different distribution of shares than the shareholders voted for.¹⁷⁸ In general, in the doctrine, such a provision is said to give more flexibility as to the use of a national mechanism of compensating shareholders, such as bonds.¹⁷⁹ I agree with an approach that while using the possibility to provide shares instead of cash payment, the shares shall be issued circumspectly to avoid possible dilution and not to put remaining shareholders at risk. Therefore, in order to equal possible negative effects, additional allocation of shares must be executed for every shareholder, using the *erga omnes* obligation, for the sake of avoiding situations where some shareholders will be allocated additional shares and others will not.

The doctrine addresses a few problematic aspects related to the exercise of the right to challenge the share exchange ratio. The question of whether this right should be granted to all shareholders irrespectively of their vote is raised.¹⁸⁰ Shareholders may vote against the approval of the cross-border merger not only because they are against the conduction of cross-border operation. The reasons may be more complex: besides being discontent with the share exchange

¹⁷⁴ Akšamović Dubravka, Lidija Šimunović, and Iva Kuna, "CROSS BORDER MOVEMENT OF COMPANIES: THE NEW EU RULES ON CROSS BORDER COVERSION," *EU and Comparative Law Issues and Challenges Series (ECLIC)* 3 (June) 2019, cited p. 958, <https://doi.org/10.25234/ecllc/9038>. *Authors note*: here it is, however, questioned whether such protection tool should be granted for passive shareholders, who did not vote.

¹⁷⁵ Davies et al., *supra note*, 34: 16-17.

¹⁷⁶ Papadopoulos, *supra note*, 130: 16.

¹⁷⁷ Benedetti, *supra note*, 13: 1009.

¹⁷⁸ Winner, *supra note*, 9: 68; Davies et al., *supra note*, 34: 16.

¹⁷⁹ Papadopoulos, *supra note*, 130: 16.

¹⁸⁰ Davies et al., *supra note*, 34: 16.

ratio itself, they may consider cross-border merger to be a bad idea regardless of the share exchange ratio. I consider that all shareholders have to be provided with the right to challenge the adequacy of the share exchange ratio because otherwise, they have a choice to vote in favour and then dispute the share exchange ratio or vote against it and be deprived of such a right. For example, the solution for this by German and Austrian legislators is to open the remedy to all shareholders, regardless of their vote.¹⁸¹

It should, however, be emphasised that accordingly to the Directive's provisions, the shareholders cannot exercise both the right to the right to dispose of their shares for adequate cash compensation and the right to challenge the share exchange ratio and claim for additional cash payment. Those rights are mutually exclusive by nature. Neither do they have the same scope nor the same range of shareholders eligible to exercise it. In the case of the exit right, the shareholders decide to leave the company, they do not support the company's decision to conduct a cross-border merger, and they explicitly state it by voting against the approval of the common draft terms. Of course, the Member States may opt for more categories of the shareholders eligible to exercise the exit right, taking into consideration the minimum harmonisation nature of the rules contained in the Directive. Therefore, the shareholders dispose of, meaning sell, their shares for cash compensation. In this scenario, cash compensation has the role of a price paid to a shareholder for his share (or shares) at the moment when he/she exits the company.

In the case with the right to dispute the share exchange ratio, shareholders either decided to remain members of the acquiring company, or they simply did not have the legal possibility to oppose the approval of the common draft terms (for instance, they hold shares without voting rights). Hence, those shareholders consider that the share exchange ratio was calculated inaccurately, and, as a consequence, they lose a certain part of the value of their shares. In order to equalise the situation given, the shareholders claim a cash payment, with a further possibility for a company to provide instead shares, bonds, or other compensation. By this, shareholders make sure that the value of their price in the transferring company and the general value of their share in the acquiring company will be the same. Considering this, we are dealing with two shareholder's rights that have a distinct nature and are separate protection tools offered by Directive 2017/1132. Each of them has proper use in the outlined situations, procedural requirements and own peculiarities.

As a conclusion to this subchapter, it shall be stated that the right to challenge the share exchange ratio and claim additional cash payment constitutes another achievement brought by the

¹⁸¹ Art. 15 (1) German *UmwG*, *op.cit.*, (fn. 187) (for the transferring company) and Art. 225c (1) Austrian *AktG* (for both companies). "AktG - Stock Corporation Act, § 225c AktG", Jusline Recht.Schnell, accessed 25 November, <https://www.jusline.at/gesetz/aktg/paragraf/225c>.

Directive. It protects remaining shareholders of the company against inadequate valuation of their portion in share capital. The shareholders shall be granted this right irrespectively of their vote on GM, meaning they are not obliged to vote against approval in order to be protected. It is indeed a positive stipulation that the Directive excludes any actions against approval of cross-border mergers if they are based on the inadequacy of the share exchange ratio. Additional protection is granted by *erga omnes* effect of the Court decision reviewing share exchange ratio, which protects shareholders from dilution. The possibility to provide shareholders with shares instead of a cash payment shall be assessed as beneficial but shall only be applicable in the jurisdictions that ensured *erga omnes* obligation.

To sum up, this subchapter introduces the rationale of the right to dispute the share exchange ratio and claim for cash payment, procedural issues, with attention to the problematic of *erga omnes* effect. The analysed protection mechanism is a safeguard against the peril of an exchange ratio that is inadequately set.

3. ANALYSIS OF THE IMPLEMENTATION OF DIRECTIVE 2017/1132 PROVISIONS PROTECTING THE SHAREHOLDER'S RIGHTS IN THE CROSS-BORDER MERGERS IN THE SINGLE MARKET INTO COMPANY LAW OF SELECTED JURISDICTIONS.

The Directive's protection mechanisms that were analysed in Chapter 2 of this master thesis indeed create an overarching framework for the shareholder's rights protection in cross-border mergers within the internal market. The directive provides for common standards, not directly applicable rules; therefore, it needs to be transposed into the company law of the Member States. Article 288 of the TFEU stipulates: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".¹⁸² While being the common legal basis for business activity across the EU, the Directive contains minimum harmonisation rules, which means that each Member State, while transposing the Directive into its' national company law, can provide increased protection for the shareholders. Besides this, the provisions of national legislation, e.g. procedural law, shall be sufficient to facilitate and support the execution of the Directive.

The importance of a comprehensive comparative analysis of the implementation of shareholder protection in cross-border mergers within the EU internal market consists of the possibility to assess to what extent the protection mechanisms are unified among selected Member States. Hence, the unified protection mechanisms would greatly facilitate the shareholder's rights protection, in particular, it would address the root cause of the peril behind the change of applicable law in resulting from the cross-border merger company. **For the purpose of this chapter, the implementation of the Directive 2017/1132 provisions concerning the shareholder's rights protection in cross-border mergers will be analysed in the following Member States: Germany, Ireland and Belgium.** The boundaries of the research on implementation include the examination of the peculiarities of the right to information within the framework of cross-border merger, the right to vote on the approval of common draft terms of cross-border merger, exit right and the right to dispute share exchange ratio within selected jurisdictions.

3.1. Germany

The first jurisdiction that is to be analysed in this chapter is Germany. Like most EU Member States, the German legal system is based on the civil law tradition.¹⁸³ It should be noted that even before the implementation of the Directive, Germany had extensive procedures and rules protecting shareholder's rights. Among others, they covered the exit right and the procedure for

¹⁸² Article 288 of the TFEU, *supra note*, 16.

¹⁸³ Bartkus et al., *supra note*, 78: 536.

its' execution, the right to review cash compensation with respect to exit right, as well as the right to improve the share exchange ratio and get additional cash compensation. Moreover, German law provided that German provisions on exit right may be applicable for the cross-border merging company one's law does not provide for compensation procedure itself. Therefore, the German company law framework concerning mechanisms protecting shareholders was assessed as elaborate.¹⁸⁴ Given this, Germany was selected in order to analyse implemented provisions of the Directive within the jurisdiction that already had established tradition to make use of sophisticated instruments protecting the shareholder's rights in cross-border mergers.

In order to comprehensively analyse the implementation of the Directive's rules on shareholder rights protection, it is essential to briefly outline the following. Back in 2007, Germany transposed into its national company law the Cross-Border Merger Directive¹⁸⁵ through amending the existing legislation¹⁸⁶ – *Umwandlungsgesetz* – UmwG (hereinafter – Transformation Act).¹⁸⁷ Before the implementation of the CBMD, German law had no provisions for cross-border mergers.¹⁸⁸ In 2023 Germany implemented the Directive 2019/2121 as amending Directive 2017/1132. The deadline for transposition was 31 January 2023, and the implementation law entered into force on 1 March 2023¹⁸⁹, being late in implementation for 2 months. Hence, the German Transformation Act 2023 regulates cross-border mergers and contains rules protecting shareholder's rights in cross-border mergers.¹⁹⁰

When transposed rules on cross-border mergers, and in particular provisions as to the shareholder's protection, German legislator used referring to the rules on domestic mergers, since procedural measures are the same in some matters, e.g. as the shareholders' resolution and procedural aspects of exit right.¹⁹¹ In regard to some procedures, the German Transformation Act already contained exhaustive regulation before the implementation of Directive 2017/1132. As an example, section 29 of the German Transformation Act provided that if, by way of merger, the legal form of entity is about to change, the acquiring legal entity shall offer to each dissenting shareholder to acquire his/her shares or memberships in return for appropriate cash compensation.

¹⁸⁴ Schmidt, *supra note*, 28: 253.

¹⁸⁵ Directive 2005/56/EC, *supra note*, 14.

¹⁸⁶ Andreas Wuesthoff, "Germany", *in* Dirk Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011): 197, https://web-p-ebscobost-com.skaitykla.mruni.eu/ehost/ebookviewer/ebook/ZTAwMHh3d19fNDAwNTc4X19BTg2?sid=97acfac9-0f32-42ed-80c0-9f087d664219@redis&vid=0&format=EB&lpid=lp_44&rid=0

¹⁸⁷ "Umwandlungsgesetz", Bundesministerium der Justiz Bundesamt für Justiz, accessed 8 November 2024, https://www.gesetze-im-internet.de/umwg_1995/index.html

¹⁸⁸ Bech-Brunn and Lexidale, *supra note*, 19: 449.

¹⁸⁹ "Gesetz zur Umsetzung der Umwandlungsrichtlinie und zur Änderung weiterer Gesetze", Bundesgesetzblatt, Teil I, №51, 28 February 2023, <https://www.recht.bund.de/bgbl/1/2023/51/regelungstext.pdf?blob=publicationFile>

¹⁹⁰ Paragraphs 305-319 of German Transformation Act (UmwG), *op.cit.*, (fn. 187).

¹⁹¹ Christoph Teichmann, "Cross-border Conversions, Mergers and Divisions Based on Directive (EU) 2019/2121," (2023). <https://ssrn.com/abstract=4445498>.

By this, the German legislator explicitly provides the exit right to shareholders who are faced with an undesired change of the company's legal form, as the applicable law in case of a domestic merger does not change. Therefore, protection tools existed in German legislation before the harmonisation provided by the Directive.

In a narrower sense, the right to information among implemented provisions consists of the management body's report for shareholders, an audit of the cross-border merger. The right to obtain information creates a solid ground for further protection of the shareholder's rights. Shareholders cannot predict what the envisaged cross-border transaction is about to bring, nor can they assess the implications for the future business of the company. Only by being provided with a management body report and then with an independent examination by means of an audit the shareholder is able to have a full picture and make informed decisions.

An obligation to draw up a merger report for shareholders was present in German legislation for domestic mergers, hence, current provision¹⁹² did not give a novelty for German company law. At the same time, German law pays attention to procedural scrutiny protection of the shareholder's rights, as, for instance, a unanimous declaration of waiver for drawing up a report shall be notarised. It should also be emphasised on the approach used while referring to well-established national company law provisions. Requirements that shall be explained in a report are contained in Section 8 with regard to domestic mergers, but beyond this, it also has to be explained – the implemented provisions – the impact of cross-border mergers for shareholders and the rights and remedies available for them. By this, German legislator combines the implemented provisions with provisions on domestic mergers, giving many references to procedural legal acts.

Transformation Act allows for a representative body not to include the information, that can cause harm to one of the merging companies.¹⁹³ This provision should not be perceived as one that can harm the rights of the shareholders, as certain information is omitted because it is also required that it is obligatory to explain the reason behind the exclusion of certain information. Hence, I consider the approach of the German legislator to be understandable and bilateral. From one side, the interests of the merging companies are protected, and shareholders cannot underestimate the need to shield their company from any possible harm, as this can imply the future business of the company. From another side, shareholder's interests are protected, as even they may not possess certain degree of sensitive information, they are acknowledged as to the rationale behind such a decision.

¹⁹² Section 309 (and previously known version Section 122e) of German Transformation Act (*UmwG*) *op.cit.*, (fn. 187).

¹⁹³ *Ibid.*, Section 8 paragraph (2).

The following instrument is an audit of the cross-border merger and audit report. German auditors exercising the purpose of this tool have to examine key information, including one contained in common draft terms, e.g. if cash compensation and exchange ratio set are of fair equivalent, as well as the methods used¹⁹⁴ and justification for the application of certain method/s.¹⁹⁵ German legislator implements the Directive rules on independent expert report with regard to the rules on domestic mergers. Besides this, certain provisions analysed further are also drafted with regard to the German Commercial Code¹⁹⁶, the Stock Corporation Act,¹⁹⁷ *etc.*

German law also provide additional safeguard for minority shareholders, by allowing those holding one-hundredth part of the share capital to initiate special audit aimed at examining certain matters as to the management of the company and measures related to capital raising and reduction.¹⁹⁸ It have to be considered as additional mean of protection for shareholders, by virtue of granting them more transparency as to the management of the company, review of financial statements and operations done with assets.

Under German law, both natural and legal persons are eligible to be auditors.¹⁹⁹ Over and above, legislator pays notable attention to the procedural moments related to merger auditors. Firstly, there may be one or several auditors,²⁰⁰ which definitely shall contribute to the speed and thoroughness of the audit. Secondly, it is the Court that appoint auditor/s at a request of company/ies, and not company involves the latter by itself.²⁰¹ Such a provision greatly contributes to the impartiality of the auditor. I consider the relation link between impartiality and diligence of auditor important for compliance with shareholders' rights, as far as the protection mechanism can only be called so if it is not only present in the law but also works accordingly. Thirdly, special attention is paid to ensuring the independence of an auditor. German law contains overarching regulatory provisions as to what circumstances are deemed as precluding an auditor from being eligible to conduct the audit.²⁰²

The approach was build on few perspectives: financial interest, managing involvement and previous professional involvement within respecting company. As a matter of fact, it is hard to

¹⁹⁴ German law does not provide for valuation rules with respect to merger ratio and transfer value; the prevailing method used as to the cross-border merger share exchange ratio is the *Ertragswertverfahren* ("capitalised earnings method") *in* Schmidt, *supra note*, 44: 23.

¹⁹⁵ Section 311 with regard to Section 12 paragraph (2) of German Transformation Act (*UmwG*) *op.cit.*, (fn. 187).

¹⁹⁶ In regard to the responsibility of auditors, Section 323 of German Commercial Code. "Handelsgesetzbuch – HGB," Bundesministerium der Justiz Bundesamt für Justiz, accessed 8 November 2024, https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p1594

¹⁹⁷ In regard to appointment of special auditors to examine certain transactions Sections 142; in regard to acquisition of own shares Section 327a of German Stock Corporation Act (*AktG*), *op.cit.*, 96.

¹⁹⁸ *Ibid.*, Sections 142 (1)(2).

¹⁹⁹ Section 319 paragraph (1) of German Commercial Code (*HGB*), *op.cit.*, 196.

²⁰⁰ Section 9 paragraph (1) of German Transformation Act (*UmwG*).

²⁰¹ *Ibid.*, Section 10 paragraph (1).

²⁰² Section 319 paragraph (3) of German Commercial Code (*HGB*), *op.cit.*, 196.

foresee if and to what extent an expert will be influenced by the mentioned conditions. Nevertheless, I consider this to be indeed a circumspect step to exclude any possible chance of dependence while conducting an audit of the merger: it greatly contributes to the protection of the shareholder's interest by providing them with unbiased expert, and hence with the most impartial assessment of the compensation they are about to benefit. German legislator brings forth an in-depth chain of rules and requirements concerning this matter.

Moving on, both the merger report and audit report shall be taken into consideration before exercising the shareholder's right to vote on the approval of common draft terms of cross-border merger. By voting on merger resolutions, shareholders decide if or not they support cross-border merger decisions and, therefore, move forward with the transaction process.²⁰³

The first procedural safeguard specified in German company law is the majority needed to adopt a merger resolution. At least 3/4 of the vote cast shall be in favour of approval.²⁰⁴ Moreover, it is allowed for articles of association to provide a greater majority ratio. It should be, however, noted that it is doubtful if companies will make wide use of this provision. From one perspective, the stipulation of the greater majority is indeed beneficial for dissenting shareholders' interests, as it puts them in a position where they are able to influence the decision-making process. But from the other perspective, I rather consider that the adoption of a much higher majority threshold may not facilitate the cross-border merger process, but on the contrary, make it longer and cause delays connected with the need to gain approval from the high number of potentially passive shareholders.

The second safeguard is that even if there is a majority of votes required to pass a merger resolution, it cannot be done without the votes of certain shareholders protected by the article of association with regard to special rights,²⁰⁵ or those merging with a company one's capital contribution have not been fully paid.²⁰⁶ By stipulating this, the German legislator additionally protects these categories of shareholders. In the first case, they, e.g., exercise the right to appoint managing directors and, therefore, are in charge of the formation of the governance body of the company, whose vote shall be important for approval. In the second case, the shareholders are put at risk of acquiring the company, which may have less financial stability due to an unpaid amount of capital. Therefore, I consider this to be a rather positive implication that every shareholder from the acquiring company shall agree to merge with such an entity, as by this, they unanimously decide whether or not to take the aforementioned risk.

²⁰³ Sections 307 and 312 with regard to Section 13 and 50 of German Transformation Act (*UmwG*) *op.cit.*, (fn. 187) contain provisions on approval of cross-border merger by merger resolution.

²⁰⁴ *Ibid.*, Section 50 paragraph (1).

²⁰⁵ *Ibid.*, Section 50 paragraph (2).

²⁰⁶ *Ibid.*, Section 51 paragraph (1).

Additional procedural safeguard – notarization of approval resolution,²⁰⁷ which is a common procedure needed throughout the cross-border merger process.²⁰⁸ The involvement of a notary shall be considered as an additional step in protecting shareholders. As an impartial and uninterested party, the notary inspects the validity of cross-border merger resolution, verifies that all the shareholders clearly understand the nature of the resolution they are about to pass, and checks the adherence to procedural requirements. Therefore, if the resolution has been notarized, it means that all of the rules with respect to procedure were abided by.

The following protection tool that is to be analysed is the exit right. This right was not a novelty: even before the implementation of the Directive, German shareholders of only transferring company were provided with the possibility to exit the company if the acquiring company was not a subject of German law.²⁰⁹ Hence, exit right was not a European standard at the time, but a decision of German legislator, which later was introduced for all Member States by the Directive.²¹⁰ After implementation of the Directive into German law, the exit right is granted to shareholders of each transferring company if they won't be governed by German law as a result of a cross-border merger and have objected to the merger resolution.

The cash consideration stipulated for dissenting shareholders has suspensive effect of the entry into force of the cross-border merger.²¹¹ Hence, only after the cross-border merger takes effect, the cash compensation becomes effective. Such an approach is justified, given that the entry into force may be postponed by the variety of factors, both related (such as envisaged liquidity risks) and non-related (delays with preparation of documents) to the cash consideration discussed. Moreover, suspensive effect is logically correlated with the provision that additional compensation can only be claimed *after* the cross-border merger took effect, as from this moment the amount of the cash consideration itself becomes effective.

Another worth mentioning provision is that the German law distinguishes “notification on the acceptance of cash compensation” (or, in other words, “notification on disposal of shares”) and the actual acceptance of the latter. The problematic aspect here lies within the complexity of the declaration of one's intention to accept cash compensation. As stipulated by the Directive, the dissenting shareholders have to notify the company within 1 month after the general meeting. However, under German legislation, a special procedure on acceptance applies with regard to

²⁰⁷ *Ibid.*, Section 13 paragraph (3).

²⁰⁸ E.g. the merger agreement (Section 6), declarations of waiver (section 8), resolution on common draft-terms approval (Section 13) are to be notarized according to German Transformation Act (*UmwG*) *op.cit.*, (fn. 187) provisions.

²⁰⁹ *Ibid.*, Section 122i.

²¹⁰ Teichmann, *supra note*, 191: 13.

²¹¹ Section 313 paragraph (1) of German Transformation Act (*UmwG*) *op.cit.*, (fn. 187).

GmbH,²¹² where such acceptance requires notarial certification. Therefore, Germany has implemented the requirement to declare a decision to dispose of shares (within para.2 art. 126a), but at the same time, provided a 2-month period for those acceptances that require notarisation.²¹³ If, for instance, the shareholder did not notify the company within 1 month²¹⁴ that they want to dispose of one's shares, they won't be eligible to do so later on. On the contrary, notification within 1 month gives access to cash compensation even without further accepting the offer pursuant to Section 31, hence submitting only one declaration. In the doctrine, such an approach is called a "split-up solution,"²¹⁵ as it allows to take into account both the requirements set out in the Directive and the peculiarities of national company law, in this case, the law on limited liability companies.

In essence, the procedure to exercise the exit right according to the Transformation Act takes further steps. Firstly, the shareholders have to declare their intention to exit within one month after the shareholders' resolution on approval has been adopted. This declaration, as in the case with Belgium, in principle, is not binding with respect to acceptance a certain amount of cash compensation and only signifies the intention to dispose of shares. Secondly, dissenting shareholders have to accept (and acceptance notarised in the case of *GmbH*) the offer by a company amount of compensation within 2 months after the resolution has been passed.

Another aspect that arises from the aforementioned problematic is the relative complexity of the acceptance procedure in the context of the legal form of merging companies, in particular, with *GmbH*. As it was mentioned the special procedure applies with respect to acceptance by shareholder of *GmbH*. Such a requirement is indeed two-sided, both ensuring more protection with regard to the shareholder's rights and creating complications in comparison with ordinary acceptance. Generally speaking, the overall involvement of notaries in transactions (including cross-border mergers) is beneficial for the scrutiny and legality of the latter. This point of view is apparently supported by German notaries,²¹⁶ and may not be welcomed by practitioners, who aim at expediting the process of cross-border merger. Even taking into consideration the fact, that at the time being the so-called "split-up solution" seems to be a convenient option, the legislative

²¹² Section 15 Paragraph 4 of German Act on Limited Liability Companies (*GmbHG*). "Act on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG)," Bundesministerium der Justiz Bundesamt für Justiz, accessed 8 November 2024, https://www.gesetze-im-internet.de/englisch_gmbhg/.

²¹³ Section 313 Para. 3 Sentence 1 of German Transformation Act (*UmwG*) *op.cit.*, (fn. 187).

²¹⁴ *Ibid.*, Section 31, Section 313 paragraph (3).

²¹⁵ Jessica Schmidt, "Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung der Umwandlungsrichtlinie (BT-Drs. 20/3822)," Öffentliche Anhörung des Rechtsausschusses des Deutschen Bundestages am 7. November 2022 : 7, https://www.bundestag.de/resource/blob/918824/f5b77a7694b171ce615c4eba9a499d3b/Stellungnahme_Schmidt.pdf

²¹⁶ Dr. Oliver Vossius, "Stellungnahme für die Sachverständigenanhörung des Rechtsausschusses des Deutschen Bundestags zum Entwurf eines Gesetzes zur Umsetzung der Umwandlungsrichtlinie am 7. November 2022 BT-Drucks. 20/3822," 02.11.2022, cited p. 6-7 https://www.bundestag.de/resource/blob/918966/8f38c844c0ab176ce4ae4bf8d2308bdc/Stellungnahme_Vossius.pdf

process shall tend to making the process of acceptance of cash compensation offer less complicated.

Even before the implementation of the Directive provision, German company law provided its shareholders with the possibility to demand additional cash payment if the share exchange ratio was set too low.²¹⁷ Currently any shareholder who did not exercise the exit right shall have a legal right to dispute ratio before Court²¹⁸ and obtain additional cash payment if the latter stipulates that the ratio is inadequate. This provision equally applies to the exit right, where cash compensation can be reviewed if considered to be inadequate. In the case of the exit right, the cash compensation is to be paid within 2 weeks after the cross-border merger has taken effect. This provision on period raised concerns, as it is much shorter than it is stipulated in the Directive (up to 2 months), and then it is established by Ireland and Belgium (both 2 months after CBM took effect).²¹⁹ In the doctrine, it is said to be sufficient for the company to cover the claims but relatively short with regard to the frame between the loss of the shares and the payment of the cash compensation.²²⁰

For the purpose of obtaining cash compensation dissenting shareholders are treated as creditors in UmwG,²²¹ entering into suspensive relations with a company,²²² which equally means they may be provided with security for their claim. This is, however, not the case with regard to cash payment for remaining shareholders, as they may dispute the share exchange ratio only after the CBM takes effect. Also, the German legislator does not differentiate shareholders of transferring and acquiring company and grants both of them the possibility to dispute the share exchange ratio. Hence such an equal treatment of the shareholder within merging companies shall be welcomed.

Further, shareholders are protected against inadequate ratio as they may be granted either additional cash payment or additional shares in the acquiring company upon their request.²²³ Such provision in German law shall be considered as beneficial for protecting of shareholder's rights,

²¹⁷ Teichmann, *supra note*, 191: 14.

²¹⁸ Section 2 para. (1) of German Act on Appraisal Proceedings (*SpruchG*) stipulate that the district or regional Court in whose district the legal entity whose shareholders are entitled to apply has or had its registered office is competent. Also Section 1 para. 1 subpara. 5 on the scope of application of *SpruchG* applies to the claims challenging cash compensation and additional cash or share payment. "Act on Appraisal Proceedings", *Spruchverfahrensgesetz – SpruchG*, Bundesministerium der Justiz Bundesamt für Justiz, accessed 8 November 2024, https://www.gesetze-im-internet.de/spruchg/_1.html

²¹⁹ Regulation 37 (3) of Regulation 233/2023 (*op.cit.*, 147) with respect to Ireland and Article 12:116/1 para.1 (3) of BCCA (*op.cit.*, 97) with respect to Belgium.

²²⁰ Schmidt, *supra note*, 215: 7.

²²¹ Section 313 para. (5) sentence 2 of the German Transformation Act (*UmwG*).

²²² Such relations in German law are called "vorleistungspflichtig", provided that there are two party to one obligation, where shareholders is the first, who fulfill their part of obligation (i.e. exit the company) and the company is the second, who fulfill their part (i.e. provide the compensation).

²²³ Section 72a paragraph 1 of the German Transformation Act (*UmwG*), with further reference to Section 10a of the German Act on Appraisal Proceedings under Corporate Law (*SpruchG*).

as it allows the shareholders to be compensated to the full amount, and at the same allows the respecting company to avoid liquidity risks entailed by a huge amount of payments. For the purpose of this provision two valuation approaches is considered to be used: the method to establish additional share exchange ratio in kind and the method to compensate for the difference in value in shares.²²⁴ Due to a fact, that in order to calculate the additional amount of shares for the difference, it is necessary to determine the value of shares at the time of the Court decision (meaning the new valuation may be required, which is considered as disadvantage), the German legislator stipulates for the first method).²²⁵

Yet the German legislator implements this option in a narrower form, allowing only German stock corporations, stock corporations limited by shares and SE as transferring companies to grant additional shares and omitting *GmbH*. Moreover, it is not a general practice for *GmbH* to acquire own shares, which entails difficulties in exiting the company.²²⁶ Such a condition is demolished in the context of the cross-border merger, in order for a company to be able to compensate its shareholders, provided that there would be no need to reduce the share capital. Such limitations shall be considered justified, as they are also legitimated by legal scholars on the ground of the “personalistic nature” of *GmbH* (private LLC),²²⁷ meaning they are usually used like partnerships and have a small number of members.²²⁸ Overall, it seems logical that the regulation of the exit right with regard to private LLCs may be stricter than to publicly listed companies one’s shares are freely transferable and, therefore, cannot necessarily imply equivalence.²²⁹

Lastly, the German legislator adopts the *ex-ante* protection approach with regard to when the company shall decide to provide shares instead of cash payment, based on the fact that such a decision shall be written in draft terms.²³⁰ By and large, it is possible to let the company decide on share compensation either before the relevant Court decision or after, providing that, in this case, the company is flexible to adjust its decision concerning providing shares *in lieu* of cash. So far, the German legislator stipulates that the company must decide if it will grant shares instead of cash payment *before* the Court makes the relevant decision. This approach is said to provide more

²²⁴ Jessica Schmidt, *supra note*, 215: 11.

²²⁵ Section 10a paragraph 1 (a) of the German Act on Appraisal Proceedings (*SpruchG*).

²²⁶ Section 33 of the German Act on Limited Liability Companies, (*GmbHG*).

²²⁷ Jessica Schmidt, *supra note*, 215: 10.

²²⁸ “Die personalistisch geprägte GmbH im Lichte des neuen Beschlussmängelrechts des HGB,” Rödl&Partner, accessed 25 November 2024, <https://www.roedl.de/themen/newsletter-corporate-briefing/2024-09/personalistisch-gepraegte-gmbh-lichte-beschlussmaengelrechts-hgb>

²²⁹ Mikalonienė and Kolev, *supra note*, 5: 148.

²³⁰ Section 72a paragraph 1 of the German Transformation Act (*UmwG*).

clarity and be more advantageous to shareholders on the grounds that they do not bear the risk concerning the future value of the shares.²³¹

Concerning judicial review, it is worth noting that the German legislator gives the Court decision on cash compensation and additional cash payment *erga omnes* effect.²³² The Inclusion of this provision has two sides: from one, it greatly contributes to equality between shareholders,²³³ from another, as it was mentioned, puts the acquiring company at risk of cash outflow. I consider such a possibility rather a positive contribution to shareholders' rights protection; given the possibility to provide shares rather than cash payment, it may resolve, to some extent, the liquidity risks.

The implementation of the Directive into German legislation was accompanied by a comprehensive analysis of scientists²³⁴ and the German Bar Association,²³⁵ who welcomed the regulation and proposed their improvements. The practitioners also welcomed the implemented regime from a practical point of view.²³⁶ The German legal framework concerning rules protecting shareholders' rights was already complex and elaborate, providing an example of the establishment of such tools on the EU level. Therefore, the protection tools of German company law for the shareholders in cross-border mergers shall be considered as substantial, granting them broad information rights, the right to vote on the approval, both exit right against adequate cash compensation and the right to dispute share exchange ratio and obtain additional cash payment.

As a conclusion to this subchapter, it shall be stated the following. Germany had a longstanding tradition of giving shareholders the possibility to exit the company against cash payment, hence, the German system of mechanisms protecting shareholders gave origins to the one established by the Directive. One of the peculiarities of the German approach to implementation is the presence of cross-referents with legislation on domestic mergers, where additional safeguards are stipulated. It is beneficial for ensuring the shareholder's rights that German legislator pays a lot of attention to the independence of an expert. The majority of 3/4 needed for approval of cross-border merger and requirement of notarisation creates another contribution into solid protection. Indeed positive that the Court decision is granted *erga omnes* effect, contributing into equality between shareholders.

²³¹ Jessica Schmidt, *supra note*, 215: 10.

²³² Section 13 of the German Act on Appraisal Proceedings (*SpruchG*).

²³³ Schmidt, *supra note*, 28: 259.

²³⁴ Among them are prof. dr. J. Schmidt, *op.cit.*; prof. dr. C. Teichman, *op.cit.*

²³⁵ Deutscher Anwaltverein, *supra note*, 165: 13-14, 28-30.

²³⁶ "Conversion Directive Implementation Act Adopted: Legal Framework For Cross-Border Changes Of Legal Form And Divisions Of Corporations – Simplification Of Mergers – Acceleration Of Shareholder Compensation Appraisal Proceedings", Gleiss Lutz, accessed on 11 November 2024, <https://www.gleisslutz.com/en/news-events/know-how/conversion-directive-implementation-act-adopted-legal-framework-cross-border-changes-legal-form-and-divisions-corporations>; "Implementing The Mobility Directive", Dr Winfried Richardt, Advant Beiten, accessed on 11 November 2024, <https://www.advant-beiten.com/en/news/umsetzung-der-umwandlungsrichtlinie-umrug>.

At the same time, the compensation acceptance procedure is more complicated (and also longer in a case when *GmbH* is subject to CBM) compared to the Directive, given the peculiarities of the acceptance form established under German law. The German legislator limits the possibility of providing shares instead of cash payment to *AG*, *KGaA* and *SE* as transferring companies, leaving behind the scope a *GmbH*. Lastly, shareholders are protected by the *ex-ante* approach to the company's declaration of granting additional shares instead of cash payment by the company.

To sum up, Germany provides elaborate rules protecting shareholder's rights in cross-border mergers, and the implementation aligns with the main mechanisms presented by the Directive. Additionally, under German law, shareholders are protected by 1) the majority of at least 3/4 to pass approval resolution; 2) by flexibility with respect to the form of additional payment; 3) notarisation by a German notary of key resolutions; 4) *erga omnes* effect of the Court decision.

3.2. Ireland

The second jurisdiction that is to be analysed in this chapter is Ireland. Ireland was selected for the analysis in order to compare how the Member State, whose law is based on the common law tradition, implemented the provisions of the Directive concerning the shareholder's rights protection in cross-border mergers. Historically and geographically determined long-term relations with the United Kingdom have greatly influenced the Irish legal tradition.²³⁷ Unlike most of the Member State, who inherited civil law tradition, the common law's emphasis on the precedent and involvement of the courts may lead to differences in understanding and application of the EU law. Therefore, the difference between the common law basis of Irish company law and the civil law basis of the company law of other Member States greatly influences the process of harmonisation of company law at EU level.²³⁸

For the purpose of understanding the legal framework Ireland have in relation to the cross-border mergers, it is important to mention the following. In 2008, Ireland implemented the Cross-border Merger Directive²³⁹ by the means of creating new law²⁴⁰ – Statutory Instrument No. 157 of 2008, European Communities (Cross-border Mergers) Regulations 2008 (in this chapter hereinafter referred to as the Regulation 157/2008).²⁴¹ Neither Irish law had provision as to the domestic mergers before the implementation of the Cross-border Merger Directive, nor the latter

²³⁷ Bartkus et al., *supra note*, 78: 271.

²³⁸ Irene Lynch Fannon, "Development of Irish Company Law and Membership of the EU" *in Corporations and Partnerships in Ireland*, Wolters Kluwer, 2024, cited p. 1, <https://books.google.com.ua/books?hl=uk&lr=&id=Gpn5EAAAQBAJ&oi=fnd&pg=PP16&dq=ireland+protection+of+the+shareholders+rights+in+mergers>

²³⁹ Directive 2005/56/EC, *op.cit.*, ft.14.

²⁴⁰ Bech-Brunn and Lexidale, *supra note*, 19: 534.

²⁴¹ "S.I. No. 157/2008 - European Communities (Cross-Border Mergers) Regulations 2008", "*Iris Oifigiúil*" of 30th May, 2008, Irish Statute Book, accessed on 5 November 2024, <https://www.irishstatutebook.ie/eli/2008/si/157/made/en/print#>

was applicable to domestic mergers after implementation.²⁴² The adoption of Regulation 157/2008 not only facilitated but basically created the possibility for any “Irish company”²⁴³ to merge across borders with limited liability company/ies in other EEA Member States.²⁴⁴ The main Irish legislative piece in the area of company law is Companies Act 2014²⁴⁵, which consolidated previous Companies Act and related provisions into one statute and at the same time set out the reforms to Irish company law.²⁴⁶ Among other provisions, it contains rules on domestic mergers between Irish companies.

In 2023 for the purpose of giving effect to Directive 2017/1132 and Directive 2019/2121, amending the latter, Statutory Instrument No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023²⁴⁷ (in this chapter hereinafter referred as the Regulation 233/2023) was adopted. The deadline for transposition was 31 January 2023, and Regulation 233/2023 was signed into law on 24 May 2023, being late in implementing the Directive. This legislation act is currently the main instrument of the implementation of the Directive 2017/1132 provisions regarding shareholders’ rights protection in cross-border mergers into Irish company law. The provisions on cross-border mergers constitute Part 3 of the Regulation 233/2023. Further, the provisions on the shareholder’s rights protection are set down in Regulation 37.²⁴⁸

When analyzing the shareholders rights protection in Irish Regulation 233/2023 by the mean of right to information, it can be referred to the directors’ explanatory report²⁴⁹ and the expert’s report.²⁵⁰ Both this reports constitute a protection mechanism for the Irish shareholders’ rights protection in the cross-border merger, as provide them with vital information needed to make decisions and exercise exit right and right to dispute share exchange ratio.

²⁴² Bech-Brunn and Lexidale, *supra note*, 19: 204.

²⁴³ Under “Irish company” in the Regulation 2(1) of the S.I. Regulation 157/2008 it is meant—(a) a company within the meaning of the Act of 1963 with limited liability (other than a company limited by guarantee), or (b) a body corporate with limited liability to which section 377(1) of the Act of 1963 applies.

²⁴⁴ Margaret Stack, Jennifer McCarthy and Michael Greene, “Ireland”, *in* Dirk Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), cited pp. 44-45, https://web-p-cbscohost-com.skaitykla.mruni.eu/ehost/ebookviewer/ebook/ZTAwMHh3d19fNDAwNTc4X19BTg2?sid=97acfac9-0f32-42ed-80c0-9f087d664219@redis&vid=0&format=EB&lpid=lp_44&rid=0

²⁴⁵ “Companies Act 2014”, Irish Statute Book, accessed on 5 November 2024, <https://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/print.html>

²⁴⁶ “Irish Companies Act 2014 Overview”, Mason Hayes & Curran, accessed on 5 November 2024, <https://www.mhc.ie/latest/insights/irish-companies-act-2014-overview>

²⁴⁷ “S.I. No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023”, “*Iris Oifigiúil*” of 26th May, 2023, Irish Statute Book, accessed on 5 November 2024, <https://www.irishstatutebook.ie/eli/2023/si/233/made/en/print>

²⁴⁸ For one’s clarity it is important to note, that the Regulation 223/2023 itself is composed of Regulations, which holds the same name, but equals to the meaning of “Article” in, for instance, Directive 2017/1132. Irish legislation also operates with the term “Article”, e.g. the Constitution of Ireland is composed of “Articles”, and term “Section”, e.g. Companies Act 2014 is composed of “Sections”.

²⁴⁹ Regulation 29 of Regulation 233/2023, *op.cit.*, (fn. 247).

²⁵⁰ *Ibid.*, Regulation 30.

The Irish legislator used the name “explanatory report”. The management body of the Irish merging company – the board of directors – shall draw up a report for members of the company. The Regulation 29(1) and 29(6) was transposed identically to the Directive’s Article 124(1). Hence, the Irish legislator did not insert any additional matters that are to be included into the the report (or the section of the report) for members, but used the word “in particular”, indicating that the explanatory report may provide for more information, if the board of director decide so. Overall the procedural requirements on the directors’ explanatory report with regard to time frame, the composition and the shareholders’ power to unanimously waive it under Irish Regulation 233/2023, analysed in this paragraph, correspond to the one, stipulated by the Directive.

Concerning the independent expert’s report for members, the Irish legislator used a different formulation by keeping the name “expert’s report” and omitting the “independent” part. Instead, refers to an expert as “qualified”.²⁵¹ In order to specify the requirements applicable to an expert, the Irish lawmaker inserted a cross-referring provision, directing (leading) to the Regulation that governs an expert’s report in cross-border conversions. Although neither Regulation 30 nor 9(3) operate with a “conflict of interest”, the requirements in the latter are drafted by the Irish legislator with a clear aim of preventing possible conflict of interest. Moreover, Irish law does not extend the right to be an expert to a legal person.²⁵² Ireland literatim transposed the rules²⁵³ as to what shall be included in the expert’s report, save providing a more defined structure within Regulation 30(5). Therefore, I consider the implementation as to the structure of the report and as to the requirements for an expert to be simply implemented, as the Directive’s rules were transposed without any additional requirements, which, however, did not affect shareholder’s rights, as no provisions were omitted.

As to the civil liability of an expert drawing the report, it inserted in regulation on the cross-border conversions *mutatis mutandis*.²⁵⁴ The Irish legislator stipulates that for an expert’s misconduct or inclusion of untrue statements in the drawing of a report, the latter shall be ordered to pay loss or damages. Thus, an expert is subject to civil liability under the aforementioned provisions for his/her misconduct or inclusion of any untrue statement. Inclusion of this provision was necessary,²⁵⁵ however Ireland went further and provided not only civil liability, as Directive requires, but apart from this – criminal.

²⁵¹ *Ibid.*, Regulation 30(4).

²⁵² Additionally, Regulation 233/2023 *op.cit.*, (fn. 247), does not specify if both natural and legal persons are eligible to serve as an expert for the purpose of drawing up a report to the shareholders. From the wording of the Regulation 30 and 9 it can be deducted, that only natural persons are deemed as experts. Beside this, Companies Act 2014 (*supra* n. 245) in Section 468(5) refers as “a person” to a potential expert, who should be “qualified person”. See Section 468 (5) of Irish Companies Act 2014. See also in Public Consultations, (ft. 271) on page 3.

²⁵³ Article 125(3) of Directive 2017/1132, *supra* note, 27.

²⁵⁴ Regulation 10 of Regulation 233/2023, *supra* note, 247.

²⁵⁵ Article 133a(1) of Directive 2017/1132, *supra* note, 27.

Under Irish company law, an expert²⁵⁶ drawing up a report bears criminal liability and shall be guilty of a category two offence for any untrue statement that has been included in an expert's report.²⁵⁷ Hence, for inclusion of any untrue statements, an expert is liable both under civil and criminal law. I consider both civil and criminal liability of an expert for providing untrue statements as indeed beneficial from the perspective of shareholder rights protection. In the case of cross-border mergers, shareholders depend on the information to make informed decisions. It is important that the information and calculations in the expert's report are accurate and that shareholders can rely on it and the conclusions provided by an expert. The threat of not just being subject to civil liability but criminal shall discourage an expert from including statements that were known to be untrue.

Irish shareholders approve the common draft terms of cross-border merger and any proposed amendment to the constitution by a special resolution. Regulation 233/2023 neither defines the majority needed for approval nor provides a definition of a special resolution. However, Companies Act 2014 stipulates that 75 per cent of the votes is required in order to pass a special resolution.²⁵⁸ Therefore, the common draft terms are to be approved by 3/4 of the votes cast by shareholders of the Irish merging company. With respect to the majority rule, Irish company law has an approach of rising quantity needed to pass a resolution than is stipulated in the Directive. By this, the legislator ensures that such an important decision to approve a cross-border merger will be taken by a sufficient number of shareholders, preventing them from an undesirable transaction which may tackle their rights and interests.

The Irish legislator implemented the exit right in Regulation 37 paragraph (1). Irish legislator operates with the term "minority shareholder"²⁵⁹ to address dissenting shareholders. Although Member States are granted the possibility to provide for other members of the merging companies to have the exit right, the Irish legislator does not extend this right,²⁶⁰ creating a vacuum for shareholders possessing the non-voting shares, who desire to exit the company as the result of envisaged repercussions of the cross-border merger. Minority shareholders shall apply to the Irish successor company²⁶¹ with a request to exit the company and have 30 days after the general meeting to do so. The cash compensation is to be paid within 2 months after the effective date of the cross-border merger. Hence, these provisions are corresponding to the Directive's

²⁵⁶ Both an expert drawing up a report under Regulation 30 and any person who authorised the issue of the report are criminally liable.

²⁵⁷ Regulation 11(1) of Regulation 233/2023, *supra note*, 247.; Besides, Irish legislator make sure that expert can protect him/herself by proving that he exercised "all reasonable care and skill" and had reasonable grounds to believe the concerned statement was true.

²⁵⁸ Section 191 subsection (2)(b) of Companies Act 2014, *supra note*, 245.

²⁵⁹ Regulation 37 paragraph (1) of the Regulation 233/2023, *supra note*, 247.

²⁶⁰ *See fn.* 272.

²⁶¹ Stack et al., *supra note*, 244: 51; also Regulation 46 paragraph (1)(f) of the Regulation 233/2023, *supra note*, 247.

requirements.²⁶² Furthermore, the Irish legislator transposed the right to claim additional cash compensation. Regulation 233/2023 gives 30 days after the date of the general meeting to file a claim,²⁶³ which, for instance, corresponds to Belgian time frame. Overall, I consider that granting this time frame contributes to more certainty for a company, as every claiming shareholder equals to more cash-out for a company. At the same time, shareholders are granted a sufficient time frame to file the claim, given that they were acknowledged with an amount of cash compensation before the general meeting and are welcome to prepare for proceedings from that moment.

Under Irish company law,²⁶⁴ the right to dispute the share exchange ratio and claim a cash payment can be exercised by those shareholders who are not a minority (meaning they voted for the approval or they are shareholders of the acquiring company), did not make a request to exercise exit right and consider that the share exchange ratio as inadequately set. The Irish High Court²⁶⁵ is the competent authority under Irish law to hear both cases to provide for additional cash compensation in the case when the shareholder exercises his/her exit right and on the application to dispute the share exchange ratio and claim for additional cash payment.²⁶⁶ The decision of the Court is binding on the successor company²⁶⁷, which may provide shares or other compensation instead of a cash payment. Ireland, however, transposed this provision without further specification on the types of compensation admissible *in lieu* of a cash payment, which may be left to the discretion of articles of association or, given the commonwealth nature of Irish law, established further in the court decision.

Further, the Irish legislator adopts the Directive's provisions that the Court's final decision granting additional cash compensation/payment has *erga omnes* effect,²⁶⁸ i.e. valid for all shareholders of the merging company who decided to exercise the exit right/dispute the share exchange ratio, notwithstanding that the shareholder concerned might not have applied to the Court. It is moreover allowed that the court in its decision provides different levels of additional cash compensation for different classes of shareholders.

The formulation²⁶⁹ is not quite understandable as to the few aspects. Firstly, it is not clear whether the Irish legislator intended to provide different levels of cash compensation/payment for different classes of shareholders within the company, meaning those who hold different types of

²⁶² Article 126a(2) and Article 126a(3) of the Directive 2017/1132, *supra note*, 27.

²⁶³ Regulation 37 paragraph 4 of the Regulation 233/2023, *supra note*, 247.

²⁶⁴ *Ibid.*, Regulation 37 paragraph 7.

²⁶⁵ Regulation 2(1) of the Regulation 233/2023, *supra n.* 247, determine that "Court" means the High Court

²⁶⁶ "New Regulations on Cross Border Conversions, Mergers and Divisions", Mason Hayes & Curran, accessed on 5 November 2024, <https://www.mhc.ie/latest/insights/new-regulations-on-cross-border-conversions-mergers-and-divisions>

²⁶⁷ Regulation 46 (1)(e) of the Regulation 233/2023, *supra note*, 247.

²⁶⁸ *Ibid.*, Regulation 37 paragraph 5(a).

²⁶⁹ *Ibid.*, Regulation 37 paragraph (5)(b) and paragraph (8)(b).

shares;²⁷⁰ or if it was referred to as “different classes of shareholders” to differentiate the active shareholders, who initiated proceedings, and passive, who benefit from *erga omnes* effect of the Court decision by obtaining adjusted cash compensation/payment. From the wording, which states “for different classes of shareholder referred to in subparagraph (a)”, it can be deduced, that the decision affects all shareholders, who are mentioned in this para. (a). In the case of provision 5(a), is it more understandable, as among them, there are those who 1) applied to exit the company and 2) did not claim additional compensation. Here the open question remains what the legislator meant under different levels of compensation.

Secondly, in the case with Regulation 37(8)(a) the list of eligible is different. Among them are 1) each shareholder who is not a minority shareholder, meaning the one who a) voted for approval, b) voted against approval but did not request to exit company, c) the shareholder of acquiring company (implying that for them applicable law won't change, save for creation of new company in 3rd Member State), who is also either a) or b); and applying condition to all of them 2) did not apply to the Court to dispute share exchange ratio. So this is every shareholder, contained in para. (a), as meant my Irish legislator. Therefore, according to the wording “different classes of shareholder referred to in subparagraph (a)”, it can be deduced that every “composed” shareholder from this categories shall be eligible to obtain different levels of additional cash payment. E.g. the shareholder of the transferring company who voted for the approval but did not apply to the Court to dispute the share exchange ratio and the shareholder of the acquiring company who voted against the approval, did not exit the company and did not apply to the Court, may obtain a different level of cash payment, or different amount of shares etc. Aforementioned matter creates vagueness as to their right to get additional cash payment or cash compensation, even given the fact, that shareholders within the same class are treated equally.

Possibly, the Irish legislator intends to draw a distinction between active and passive shareholders by providing the Court with the possibility to award higher level cash compensation/payment to the initiators of the application. From one point of view, it is evident that shareholders who applied to the Court ventured their resources and devoted time to dispute the share exchange ratio and claim a cash payment/compensation. In this case, the remaining shareholders shall be perceived as either consilient with the cash compensation/share exchange ratio proposed by the draft terms (and therefore are not eligible to obtain it), or disinterested in disputing it. From another point of view, I rather doubt if such an approach corresponds to the

²⁷⁰ Companies Act 2014, *supra n.* 245, in the Section 66 subsections (1), (3), (4), (9) provide that company may allot shares of different nominal values, currencies, amount payable on them and with a combination of 2 or more of the foregoing characteristics; *also* any share in the company may be issued with preferred, deferred, redeemable or other special rights (save for the bearer instrument) on regard to dividend, voting etc. Notwithstanding, all the issued shares in a company within particular class ranks *pari passu* (Companies Act 2014, Section 67).

initial sense embedded in Article 126a (6) of the Directive, where the protection by the means of *erga omnes* effect of the authority's decision was stipulated for any shareholders, who did not exercise or did not have their exit right.

Before the Directive was implemented into Irish company law, Department of Enterprise, Trade and Employment made public consultation of the transposition of Directive 2019/2121 amending Directive 2017/1132, asking respondents to comment on the articles, that provide choice to Member States.²⁷¹ Hence, as to the provisions granting protection of members, it was asked if Ireland should avail the option to grant the exit right to more categories of shareholders, then stipulated by the Directive; also if Ireland should avail the option to grant *erga omnes* effect to the Court's decision to provide additional cash payment/compensation; and lastly if Ireland should avail the option that successor company can provide shares or other compensation instead of cash payment. The submission prepared by Company Law Review Group²⁷² recommended not to extend the cash consideration for members other than dissenting, but agreed that Ireland should take up the option about *erga omnes* effect of decision and providing other than cash means of compensation.

Irish practitioners highly welcomed Regulation 233/2023, which contains implemented rules on the shareholder's rights protection from Directive 2017/1132 (as amended by Directive 2019/2121). The new regime contains a "simpler procedure"²⁷³ as certain requirements may be waived or shall not be required, and safeguards protecting the minority shareholders.²⁷⁴ The Regulation also enables online court applications, which may facilitate the transaction process and access of the stakeholders from other jurisdictions to the Court hearings.²⁷⁵ According to the 2023' Companies Registration Office Report, five applications for cross-border mergers were received during 2023 after the new Regulation 233/2023, while none of them were terminated before the

²⁷¹ "Public Consultation on the Transposition of Directive (EU) 2019/2121 of the European Parliament and Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. Company Law", Department of Business, Enterprise and Innovation, accessed 5 November 2024, pp. 29-30, <https://enterprise.gov.ie/en/consultations/consultations-files/public-consultation-transposition-directive-eu-2019-2121.pdf>

²⁷² "Consultation on Directive (EU) 2019/2121 of 27 November 2019 (the Cross-Border Conversions and Divisions Directive) Review Group Submission on Member State Options" prepared by Company Law Review Group, 13 October 2020, Department of Enterprise, Trade and Employment accessed 5 November 2024, pp. 7-8, <https://enterprise.gov.ie/en/consultations/consultations-files/clrg-submission-eu-directive-2019-2121-consultation.pdf>

²⁷³ "Ireland adopts new regulations to enhance corporate cross-border EU mobility", Pinsent Masons, 5 June 2023, accessed on 5 November 2024, <https://www.pinsentmasons.com/out-law/news/ireland-adopts-new-regulations-to-enhance-corporate-cross-border-eu-mobility>

²⁷⁴ Explanatory note of the Regulation 233/2023, cited p. 95, accessed 5 November 2024, <https://www.irishstatutebook.ie/eli/2023/si/233/made/en/pdf>

²⁷⁵ Mason Hayes & Curran, *supra note*, 266.

end of the year.²⁷⁶ The number may be explained by the fact that new legislation came into force in May, leaving less than 6 months for companies to conduct cross-border mergers.²⁷⁷

As a conclusion to this subchapter, it shall be stated the following. Although Ireland implemented the Directive's rules into company law after the set deadline, it still provides a harmonised legal framework governing shareholder protection in cross-border mergers across the EEA. The approach to implementation may be described as *litteratim* in many aspects. Regulation 233/2023 gave use of the Directive provisions, neither changing nor augmenting the scope of many provisions, among them are both management and expert reports, save for the changes in the names of the reports. Some important matters were proposed for public discussion among practitioners and scientists and were most likely influenced by their conclusions. I consider such an approach shall be welcomed, as Member States have their authority as to the forms and methods used in the course of implementation, given that it ensures the protection of shareholder rights.

Indeed, a positive application is granting the Court's decision on the cash compensation/payment *erga omnes* effect. At the same time, the formulation of Regulation 37(5)(b) and (8)(b) remains ambiguous concerning what classes of shareholders shall be granted different levels of additional cash payment and need to be amended in order to specify either classes of shareholders in question or rationale behind such approach. The exit right is not extended to any additional category of shareholders, leaving "non-voting" shareholders behind with the only possibility to further dispute the share exchange ratio. Lastly, the presence of both civil and criminal liability of an expert directly in Regulation 233/2023 emphasises the vital nature of independence and accuracy for guaranteeing shareholders' access to reliable information on valuation within the expert's report and serves as a safeguard protecting shareholders' interest.

To sum up, Irish legislator included specific provisions: 1) the majority of at least 3/4 to pass special approval resolution 2) included criminal liability for an expert drawing up expert's report; 3) the Court's decision, granted *erga omnes* effect, may provide for different levels of cash payment/compensation for different classes of shareholders.

²⁷⁶ "Companies Registration Office Report 2023", Companies Registration Office Ireland, accessed 5 November 2024, <https://cro.ie/wp-content/uploads/2024/07/CRO-Annual-Report-2023.pdf>

²⁷⁷ According to the information provided in Companies Registration Office Report 2022, during 2020-2022 there was reported 23 completed cross-border mergers by acquisition and 20 completed cross-border mergers by absorption. For instance, since the implementation of Directive 2005/56/EC 98 companies have been merged into Ireland and 133 have left the Ireland. **Source:** "Companies Registration Office Report 2022", Companies Registration Office Ireland, accessed 5 November 2024, https://opac.oireachtas.ie/Data/Library3/Documents%20Laid/2023/pdf/DETEdoclaid050723_153325.pdf

3.3. Belgium

The third jurisdiction that is to be analysed in this chapter is Belgium. Like most Member States, the Belgian legal system is based on the civil law tradition.²⁷⁸ Belgium was selected for the analysis, at least for the reason that Belgian dissenting shareholders in cross-border mergers did not benefit from the exit right before the implementation of the Directive.²⁷⁹ The right to exit for shareholders was known in an ordinary (outside of merger procedure) context, without entering in the conflict with a company, with equal possibility to either be excluded by a company's resolution²⁸⁰ or expelled by a judicial decision.²⁸¹

In order to analyse the implementation of the Directive's rules on shareholder rights protection, it is worth pointing out the following. In 2008, Belgium implemented the Cross-Border Merger Directive by means of amending²⁸² the existing Company Code. Therefore, Belgium provided for the possibility to merge across borders before the implementation of Directive 2017/1132. In 2023, Belgium implemented Directive 2019/2121 as amending Directive 2017/1132. The implementation law entered into force on 16 June 2023,²⁸³ breaking the deadline for 6 months. Through implementation, the new Books 12 and 14 were added to the current Code on Companies and Associations²⁸⁴ (hereinafter – Belgian CCA or BCCA). Hence, besides the provisions on domestic mergers, that are equally applicable, Belgian CCA, Book 12, Title 6 regulates cross-border mergers and contains rules protecting shareholder's rights in cross-border mergers as implemented.

Rules on information protecting the shareholder's rights constitute the preparation and publication of management and auditor reports. Belgian legislator also grants shareholders with safeguard as to the informing them with cross-border merger proposal. Hence, the latter may be either published in Belgian State Gazette or made available on the company's website with further

²⁷⁸ Bartkus et al., *supra note*, 78: 414.

²⁷⁹ Isabelle Corbisier, "Cross-Border Mobility Within the EU and Specifically in Luxembourg and Belgium: Same Destination, Different Roads", *European Company Law Journal* 16, no. 1 (2019): 26. <https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019004>

²⁸⁰ Christoph Van Der Elst, "21st Century Company Law in Belgium", *European Company Law Journal* 17, no. 2 (2020): 26, <https://kluwerlawonline.com/journalarticle/European+Company+Law/17.2/EUCL2020006>

²⁸¹ Dirk Van Gerven and Maxime Berlingin, "Arbitration and Company Law in Belgium", *European Company Law* 12, no. 3 (2015): 134, <https://kluwerlawonline.com/journalarticle/European+Company+Law/12.3/EUCL2015020>

²⁸² Dirk Van Gerven, "Belgium", in Dirk Van Gerven, *Cross-Border Mergers in Europe: Volume II* (Cambridge University Press, New York 2011), p. 104. https://web-p-ebscobhost-com.skaitykla.mruni.eu/ehost/ebookviewer/ebook/ZTAwMHh3d19fNDAwNTc4X19BTg2?sid=97acfac9-0f32-42ed-80c0-9f087d664219@redis&vid=0&format=EB&lpid=lp_44&rid=0

²⁸³ "Loi modifiant le Code des sociétés et des associations, la loi du 16 juillet 2004 portant le Code de droit international privé et le Code judiciaire, notamment à la suite de la transposition de la directive (UE) 2019/2121 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne les transformations, fusions et scissions transfrontalières", Service Public Federal Justice, accessed 12 November 2024, <http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2023/06/06/151991.pdf>

²⁸⁴ "Code des sociétés et des associations", Service Public Federal Justice, accessed 12 November 2024, https://www.ejustice.just.fgov.be/cgi_loi/article.pl?language=fr&lg_txt=f&type=&sort=&numac_search=&cn_search=2019032309&caller=SUM&&view_numac=2019032309dx2019032309f#list-link-1

link to the company's page on the Belgian State Gazette.²⁸⁵ Such a provision gives more flexibility for a company concerning the publication of a proposal. Nowadays, for shareholders from different jurisdictions, it is indeed convenient to access documents on their company's website. The practitioners, however, note that such an option may not be preferable among companies, as the accessibility to publish proposals via website influences the 6-week time frame requirements while filling the latter via the local clerk office grants additional time taken for formal procedures.²⁸⁶

I consider such an approach as a step forward in the tools for shareholder protection, making the information on cross-border mergers more accessible and convenient due to electronic form. Also, in a case when an operation has to be conducted faster, this may facilitate such a need by providing a publication tool that does not require additional time to comply with publication formalities, as is the case with the clerk's office. Following the same approach, the common draft terms of the proposed cross-border merger have to be made available for shareholders via registry or electronically on the website 3 months prior to the general meeting.²⁸⁷

The emphasis on electronic communication may be seen in a recent cross-border merger that took place between Belgian and Dutch companies Vastned Belgium N.V. and Vastned Retail N.V. On their website, there is an additional column with merger documents available.²⁸⁸ Among them are merger announcements, common draft terms of cross-border merger, and both board and audit report. Besides this, draft minutes of the general meeting held on 25 September 2024, as well as voting results, are also published. On the site there also annual reports from the last 3 year, from 2021 to 2023. The publication of annual reports for the last three financial years also corresponds to the provision of document transparency within the cross-border merger of the European Model Companies Act.²⁸⁹ Every document is presented at least in English, while some of them are also in Dutch; all are accessible to download. Such communication not only grants shareholders information, it facilitates the access of shareholders to information to a great extent and constitutes a basis for further potential application with withdrawal requests, etc.

As to the management report,²⁹⁰ the Belgian legislator stipulates the necessity to include, among others, the information as to the cash payment and the method/s to arrive at the amount proposed and the share exchange ratio proposed, as well as the rights available for the shareholders by the Article 12:116/1 of CCA. Therefore, provisions on a management report, as to the contents, the possibility to waive the need to draw up such a report, and the 6-week time frame for

²⁸⁵ Shall be made available at least 6 weeks before the General Meeting, Article 12:24 BCCA, *supra note*, 284.

²⁸⁶ "Belgium implements the EU mobility directive: what changes for M&A?", Maxime Colle (LYDIAN), accessed 12 November 2014, <https://www.lydian.be/en/news/belgium-implements-eu-mobility-directive-what-changes-ma>

²⁸⁷ Article 12:112 paragraph 1,2 of BCCA, *supra note*, 284.

²⁸⁸ "Merger Documents", Vastned, accessed 15 November 2024, <https://vastned.com/merger-documents/>

²⁸⁹ Andersen et al., Article 13:26, *supra note*, 122.

²⁹⁰ Article 12:113 of BCCA, *supra note*, 284.

publication are aligned with the Directive requirements and constitute a protection basis for shareholders.

The further instrument that grants shareholders access to the information on the company's activity on cross-border merger is the audit report.²⁹¹ The Belgian CCA provides that such a report may be prepared either by a Commissioner, company auditor²⁹² or a certified accountant – *expert-comptable certifié* – who is to be appointed by the management body. Under Belgian law, both natural and legal persons are eligible to be auditors, only natural persons are eligible to be certified accountants; and are subject to both civil and criminal liability²⁹³, which is regulated at great length by subsidiary Acts.²⁹⁴

The Belgian legislator provides minority shareholders with another protection tool of a mixed nature with regard to the right to information and audit examination.²⁹⁵ The shareholders holding at least 10% of shares have a right to appoint an expert in order to conduct an audit of the company's books and accounts. This mechanism can be executed only if there's a risk of serious harm to the interests of the company. By this, shareholders are protected by the possibility to examine operations carried out in the company and how the latter may affect their rights and interests. Legislator greatly facilitate the possibility to appoint expert examination by neither connecting number of votes to the types of votes, for example, that only shareholders with voting shares may initiate such procedure, nor stipulating to what amount of capital in euro such portion must correspond.

The right to information is also granted by the requirement to inform shareholders during the general meeting on management and expert reports and obtain a copy of them free of charge.²⁹⁶ By and large, the Belgian CCA rules grant the shareholders wide access to the documents involved in the procedure of cross-border merger, from the requirement to publish them on the company's website²⁹⁷ to the possibility to alternatively obtain them free of charge during general meeting. Belgian shareholders have also one month prior to the general meeting to familiarise themselves

²⁹¹ *Ibid.*, Article 12:114.

²⁹² The professional activity of company auditors is regulated by Law on the Organization of the profession and public supervision of company auditors from 7 December 2016, which provides requirements on different aspect of his activity, among others, with regard to eligibility of auditor and his liability (e.g. articles 4, 62).

²⁹³ Under article 458 of Belgian Criminal Code any professional is subject to criminal liability in case he/she revealed information trusted them in the course of exercising their profession. "Code Penal", Service Public Federal Justice, accessed 14 November 2024, https://www.ejustice.just.fgov.be/cgi_loi/article.pl?language=fr&lg_txt=f&type=&sort=&numac_search=&cn_search=1867060801&caller=SUM&&view_numac=1867060801f

²⁹⁴ Articles 3, 10, 44 of "Loi relative aux professions d'expert-comptable et de conseiller fiscal du 17 mars 2019", Service Public Federal Justice, accessed 14 November 2024,

<https://www.ejustice.just.fgov.be/eli/loi/2019/03/17/2019040805/moniteur;>

²⁹⁵ Article 5:106 of BCCA, *supra note*, 284.

²⁹⁶ Given that such obligation was not fulfilled six weeks prior and they are not published on the company's website. BCCA, *supra note*, 284, article 12:115: paragraph 1; and paragraph 3 in regard to the 6-week requirement; and paragraph 4 with regard to publishing on the website.

²⁹⁷ Van Der Elst, *supra note*, 280: 26.

with, among others, financial information of the merging companies. In particular, the annual accounts for the last three financial years of each of the merging companies,²⁹⁸ and any other report or document given, if it was prepared. Hence, informational transparency is encouraged by the Belgian legislator, which contributes to solid ground for the execution of further protection mechanisms.

Concerning the shareholder's right to vote on the approval. The decision on approval of the common draft terms of the cross-border merger is taken by a majority of at least 3/4 (three quarters) votes if, on the GM, at least half of the capital or half of the total issued shares is represented.²⁹⁹ The Belgian legislature provides a high standard for the majority. During the voting, those shareholders who hold shares without voting rights are granted one vote per share each for the purpose of voting on the approval of a cross-border merger.³⁰⁰ The rationale behind granting one vote per share for non-voting shareholders is that in this case they will be eligible to exercise the exit right, as they are able to vote against the approval. Moreover, if within the company's shareholders there are different classes of shares represented,³⁰¹ each class has to vote and gain the mentioned majority to approve the cross-border merger.³⁰² I deem that by this, the additional protection was achieved for the shareholders of different classes who's position in the acquiring company are about to change as a repercussion of a cross-border merger, notwithstanding that such requirement may bring more complexity related to the voting process.

Lastly, somehow similar to the German requirements, the Belgian legislator protects shareholder interests by involving a notary in the process of approval of the common draft terms.³⁰³ In general, notaries have wider powers and tasks during cross-border merger under Belgian law, but his/her presence also serves to protect shareholders of a company by checking the formality of all aforementioned documents, reports, cross-border merger terms, demanding additional documents (including all comments submitted by or on behalf of the shareholders³⁰⁴) and even call upon an independent expert. I consider as indeed beneficial for the shareholders the presence of the impartial body in order to certify legality and abidance by the prescribed procedure, to verify

²⁹⁸ Article 12:115, paragraph 2 (3,4,5) of BCCA, *supra note*, 284.

²⁹⁹ *Ibid.*, Article 12:116 paragraph 1 (1,2).

³⁰⁰ *Ibid.*, Article 12:116 paragraph 1 (2b, second subparagraph) with regard to Article 5:47 paragraph 1 (3), 7:57 paragraph 1 (3).

³⁰¹ It is worth noting, that Belgian legislator implies the wording "*un titulaire d'actions ou de parts bénéficiaires*" (meaning "shareholders and holders of beneficiary shares") throughout the articles. Such shares are regulated by Articles 7:58 and 7:59 of BCCA, *supra note*, 284, they do not represent capital and it is up to the articles of association whether grant or not them the voting rights. In the case with voting on approval of cross-border merger, the holders of beneficiary shares are granted one vote per share, in order to fulfill the requirement of Article 12:116/1 para.1, *supra note*, 284 (vote against cross-border merger) and be eligible to exercise exit right.

³⁰² Article 12:116 paragraph 4 with regard to Articles 5:102 paragraph 3, 6:87 paragraph 3 of BCCA, *supra note*, 284.

³⁰³ *Ibid.*, Article 12:117.

³⁰⁴ "Belgium Implements the EU Mobility Directive", Cleary Gottlieb Steen & Hamilton LLP, accessed 12 November 2024, cited p.:10, <https://www.clearygottlieb.com/-/media/files/alert-memos-2023/belgium-implements-the-mobility-directive.pdf>

that shareholders approve the common draft terms being acknowledged with all necessary documents.

As it was mentioned before, Belgian shareholders, dissenting against a cross-border merger, did not benefit from the possibility to exit the company against cash compensation before. Hence, the introduction of this mechanism is to be considered a major improvement in the shareholder rights protection framework. The exit right in Belgian implementation has distinguishing features from the one analysed in other subchapters and thus its own peculiarities. Execution of exit right can be roughly divided into three sections: notification to the company of one's intent to exit before the general meeting, voting against approval of the cross-border merger and, finally, confirming one's intention during the general meeting.³⁰⁵

Firstly, the requirement to pre-notify a company on one's intention to exit goes hand in hand with discussed in the Chapter 1 cash out-flow threat for a merging company. Such option was adopted pursuant to Article 126a paragraph 1 subparagraph 3 of the Directive. The BCCA does not provide for a particular time frame within dissenting shareholder have to notify the company. Nevertheless, the purpose behind this consists in providing a company with the possibility to pre-estimate the future amount of the cash compensation and if this amount falls within the capability to meet the latter, which is convenient for the company, Yet, from the shareholder's perspective, this creates a peril, as most likely, it won't be possible to change their decision and vote against the approval, or such voting won't grant the right to exit. Despite the fact that such an option was adopted pursuant to Article 126a para. 1 (3) of the Directive, it constitutes ambiguity and was implemented with regard to the company's liquidity in the face of numerous exiting shareholders.

Secondly, the dissenting shareholder has to vote against the approval of common draft terms. Therefore, the ones who did not vote or abstained are behind the scope of the exit right in the Belgian law perspective. I deem such an approach as beneficial given two moments. First, the Belgian legislator granted "non-voting" shareholders one vote per share at the general meeting with the mere reason – to allow them to oppose and, as a result, exit the company. Therefore, those who desire to exit have a tool in their hands to do so. Second, all the remaining shareholders (dissenting or not), who did not vote against are perceived either as consentient with the cross-border merger or as passive. It was also analysed previously, that granting passive shareholders the exit right poses a threat and encourages "free-riding" or disinterested behaviour among shareholders.³⁰⁶

Lastly, the shareholder has to confirm their own intention to exit at the general meeting. It is important to point out the wording of the Article where "he/she exercises this right (exit right –

³⁰⁵ Article 12:116/1, para. 1 of BCCA, *supra note*, 284.

³⁰⁶ *See, Winner, supra note*, 9: 66.

authors note) at the general meeting which decides to proceed with a cross-border merger”.³⁰⁷ The wording of an article focuses attention on the condition that the dissenting shareholder has to exercise the exit right during the general meeting *which decides to proceed*. After shareholder notified a company of their intention to exit, and a company could estimate the potential amount of payment, the latter has an option not to proceed with a cross-border merger if it poses a significant threat to its financial welfare.³⁰⁸ Article emphasises: *given that* the general meeting decides to proceed, dissenting shareholders have to re-approve their own choice to exercise the exit right.

Therefore, I don’t agree with the position³⁰⁹ that re-confirming of one’s intention to exit constitutes additional obstacles in the execution of the exit right and was inserted intentionally. The rationale behind formulating it this way was to stress the fact that after pre-informing the company on their exit, the need to hold it may cease to exist if a company decided to pull back cross-border operation; in the situation where the general meeting has nonetheless gathered to approve cross-border merger, shareholders are asked to confirm their intention to exit.

The second procedural element of exit right is the possibility to claim additional cash compensation indicated in the common draft terms.³¹⁰ If a dissenting shareholder considers the cash compensation inadequate, he/she can apply with a claim to the President of the Enterprise Court within one month after the general meeting. Under Belgian company law, both transferring and acquiring companies may be in charge of payment cash compensation within two months, this follows from the wording where “cash compensation may *also* be made by the acquiring company”. On the contrary, Irish Regulation 233/2023 sets the requirement that every payment within Regulation 37 is to be made by a successor company,³¹¹ as well as the German Act on Appraisal Proceedings sets that claim to dispute the cash compensation, dispute the share exchange ratio and claim additional cash payment shall be filled against an acquiring (or newly created) company.³¹²

Further, the Belgian legislator ruled not to grant the Court decision on the revaluation of the cash compensation *erga omnes* effect. Again, the emphasis was given to intolerance to passive attitude when it comes to initiating proceedings. Such an approach, however, is not beneficial

³⁰⁷ Article 12:116/1 para. 1 of BCCA, *supra note*, 284.

³⁰⁸ In order to minimize cash out-flow it was proposed by Belgian practitioners to set the maximum amount of shares, that can be cashed out. Two requirement shall meet: 1) the shareholders possessing together of no more than X% of shares exercise exit right and 2) the company will have at least X amount of cash after reimbursing all compensations. **Source:** “Belgium Implements the EU Mobility Directive”, Cleary Gottlieb Steen & Hamilton LLP, accessed 12 November 2024, cited p.: 6, <https://www.clearygottlieb.com/-/media/files/alert-memos-2023/belgium-implements-the-mobility-directive.pdf>

³⁰⁹ *Ibid.*, 4.

³¹⁰ Article 12:116/1 para. 1 of BCCA, *supra note*, 284.

³¹¹ Regulation 46 (1)(e) of the Regulation 233/2023, *supra note*, 247.

³¹² Section 5 (5) of SpruchG, *supra note*, 218.

concerning remaining shareholders, as it puts them in an unequal position. Lastly, the cash compensation shall be paid only after the company has satisfied the creditors. Being in the position of the company's creditor may additionally discourage shareholders from effectuating the exit right.

Although Belgium implemented the right to exit the company for dissenting shareholders, the Belgian approach is considerably different with respect to Germany and Ireland, which were analysed in this Chapter, as neither of them requires the pre-opposition to the cross-border merger approval nor ignores *erga omnes* obligation. Such *modus operandi* encompass ambiguity and, hence, uncertainty for shareholders. From one side, such a provision might be included for the mere reason of preventing destructive consequences for a cross-border merging company's assets. From another side, I consider that it leads to procedural complexity with regard to the dissenting shareholders, who have to be acknowledged enough with requirements in order to fulfil them and exercise the exit right. It is also possible that the Belgian legislator tried to somehow discourage shareholders from leaving the company, but everything depends on how this procedure will be executed in practice. As it was stated previously, individual lawsuits can burden shareholders procedurally, overwhelm the judiciary with multiple cases, and result in an inconsistent court decisions on compensation. Therefore, Belgium does not make use of the possibility to resolve the aforementioned complexity by implying *erga omnes* obligation.

The following new possibility for protecting shareholders' rights implemented in Belgium is the right to dispute the share exchange ratio and claim additional cash payment.³¹³ It is worth noting that based on the formulation of article,³¹⁴ this right is not available for holders of beneficiary shares, only for shareholders (remaining) and partners, whether intentionally or as a discrepancy in legislative technique. The execution of this right is similar to the one prescribed for the exit right. Firstly, the shareholders must inform to the company on their disagreement with the share exchange ratio at the latest during the general meeting. Thereby, the legislator expects shareholders to do this before the general meeting and, basically, pre-inform the company as is the case with the exit right. Secondly, the shareholders have to vote against the approval of the common draft terms, and their vote has to be indicated in the minutes of the general meeting. And lastly, in order to be eligible to dispute the exchange ratio, they must refrain from exercising the exit right. After, the shareholders have 30 days after the general meeting to launch a claim before

³¹³ Article 12:116/1 para. 2 of BCCA, *supra note*, 284.

³¹⁴ *Ibid.*: In particular, in para. 1: "*chaque titulaire d'actions ou de parts bénéficiaires*" ("shareholders and holders of beneficiary shares"), while in para. 2: "*chaque associé ou actionnaire*" ("partners and shareholders").

the President of the Enterprise Court stating that they consider the share exchange ratio inadequate and seek additional cash payment.³¹⁵

Belgian legislator implemented provided by the Directive possibility to replace additional cash payment by allocation of shares in the acquiring company, including an option to provide other remuneration in kind. Remuneration in kind can have a form of financial instrument, such as bonds. Given the fact that Belgian CCA, as applies with exit right, does not extend the *erga omnes* effect to the Court decision granting additional cash payment, it may be problematic to keep balance concerning equal treatment of shareholders. In the case of the exit right, dissenting shareholders left the company, and roughly speaking, they won't be affiliated or bound with other dissenting shareholders within a company, resulting from the cross-border merger.

On the contrary, the shareholders who successfully disputed the share exchange ratio remain within the same company (acquiring or newly created) with those who did not initiate or join proceedings. In case when the additional payment will be executed by means of allocation of shares, those shareholders who did not apply with a claim are faced at least with the risk of being in a position where their shares are diluted. Hence, the non-application of *erga omnes* obligation with regard to the Court's decision on the share exchange ratio seems to be more problematic than the one relating to exit right since it affects the future position in a resulting company, creating a continuing violation of their rights.

As a conclusion to this subchapter, it shall be stated the following. In the case of Belgium, the implementation process brought important tools protecting shareholder rights in cross-border mergers. These provisions will indeed facilitate the way shareholders are able to oppose the approval and avoid repercussions of unwanted cross-border transactions, starting from the required majority and up to the possibility of leaving the company. Belgium actively implements electronic participation within the CBM process, which constitutes a big step ahead given modern circumstances, and such a vector shall be considered as beneficial with regard to the facilitation of access to information for shareholders. A practical approach is adopted by giving every shareholder one vote during the approval of the common draft terms; it ensures that dissenting shareholders can vote against and does not have to imply contestation of share exchange ratio instead, being forced to remain shareholders by lacking the possibility to vote.

The requirement to pre-inform a company on one's intention to exercise exit right remains ambiguous and lacks clarity whether non-informing before the general meeting and voting against during shall still provide for the possibility to exit; and if no, what status is given to these

³¹⁵ Belgian legislator does not literally use the term "adequate" in relation to cash compensation or payment, but "satisfactory" e.g. shareholder "is not satisfied with" cash payment/compensation. at *Ibid.*, art.12:116/1 para.1; "relevant and reasonable" e.g. "*le rapport d'échange sont ou non pertinents (relevant) et raisonnables (reasonable)*" at *Ibid.*, art. 12:114 para.1.

shareholders. The decision of the Belgian legislator not to grant the Court's decision *erga omnes* effect tackles the shareholder's position with regard to equity and overall differs from the approach of German and Irish legislators. I consider that this approach affects both the dissenting shareholders and the remaining, but in the case of the latter, it creates even more prejudice and perils.

To sum up, Belgium implemented the Directive protection mechanisms applying a few differing provisions where: 1) it is required to notify a company before the general meeting in order to exercise exit right; 2) *erga omnes* effect is not granted the Court's decision on cash compensation and additional cash payment; 3) one vote per share is provided to each shareholder for the purpose of voting for or opposing the approval the cross-border merger.

CONCLUSIONS

With due regard to the topic of the master thesis and analysis of the selected mechanisms protecting shareholder rights in the cross-border corporate mergers in the single market, as well as their implementation into company law of Germany, Ireland and Belgium, the following shall be concluded.

1. The regulation of cross-border mergers within the single market harmonised in Directive 2017/1132, which facilitates corporate mobility across the EEA and contains rules protecting shareholder rights. On that account, cross-border mergers constitute a means of external growth and are protected by freedom of establishment. According to the Directive, a merger is treated as cross-border if every merging company domicile within the EEA and at least two of the companies are governed by the laws of different Member States.

2. Cross-border merger is a complex operation that tackles the rights of shareholders. In particular, the shareholders are faced with a disadvantageous change of applicable law as a result of the cross-border merger; during the cross-border merger the share exchange ratio may be set inadequately, not properly reflecting the real value of the share; the cross-border merger overall may have value destroying effect on the assets of merging companies.

3. The Directive provide overarching protection through information protecting shareholder rights, which constitutes a basis for the execution of other protection tools and informed voting on the approval of the cross-border merger. Robust protection is ensured by the right to vote on the approval of the common draft terms of cross-border merger, and the majority required for this. The right to vote on the approval constitutes a safeguard against the possible value-destroying effect of cross-border merger on merging companies.

4. One of the biggest achievements of the Directive – exit right for dissenting shareholders – constitutes a protection mechanism against undesirable changes of applicable law, which may pose a threat to shareholder interests. The right to exit shall be granted to shareholders of all merging companies who voted against the approval of the cross-border merger and for whom the applicable law will change, save for passive shareholders. The right to dispute cash compensation complements the exit right and ensures the proper protection against inadequate consideration.

5. The right to dispute share exchange ratio protects remaining shareholders against the corresponding risk of inadequate valuation of their portion in share capital and allows them to apply for complementary payment. The shareholders shall be granted this right irrespectively of their vote on general meeting, meaning they are not obliged to vote against approval of the cross-border merger in order to be protected.

6. Germany had a longstanding tradition of protecting their shareholders with both the exit right and the right to improve the share exchange ratio. Indeed, it is positive that the German legislator grants the Court decision *erga omnes* effect, provides a high majority of 3/4 needed for approval of cross-border merger together with the requirement of notarisation of key resolutions. Additionally, German shareholders are protected by an *ex-ante* approach to the company's declaration of granting additional shares instead of cash payment by the company and flexibility as to the forms of additional payment. The procedure for German LLC (*GmbH*) is more complicated as it requires additional notarised acceptance for their shareholders and is not granted the possibility to provide alternative forms of additional payment.

7. Ireland implemented all the mentioned mechanisms protecting shareholder rights, providing solid framework. Additionally, the minority shareholders are protected by the majority of 3/4 needed for the approval of the cross-border merger, elaborated provisions on expert's civil and criminal liability. At the same time, the exit right is not extended to any additional category of shareholders, leaving "non-voting" shareholders behind with the only possibility to further dispute the share exchange ratio. The provision that the Court's decision, granted *erga omnes* effect, may provide for different levels of cash payment/compensation for different classes of shareholders remains ambiguous and does not specify either classes of shareholders in question or the rationale behind such an approach.

8. Belgium coherently implemented the protection mechanisms, granting their shareholders overarching protection. Indeed, a practical approach is adopted by giving every shareholder one vote during the approval of the common draft terms, ensuring that dissenting shareholders are not forced to remain shareholders by lacking the possibility to vote. The approach of the Belgian legislator to not grant the Court's decision *erga omnes* effect differs from the one adopted by Germany and Ireland and overall tackles the equity between shareholders of the company. The provision on pre-notification on one's intention to exit the company before the general meeting lacks clarity on whether non-informing and voting against during the general meeting shall still provide for the possibility to exit, and if not, what status is given to these shareholders.

Taking into consideration the aforementioned conclusions, the defended statement has been affirmed.

RECOMMENDATIONS

1. As the research showed, among Member States, the variety of approaches are used with respect to the valuation rules applicable to the share exchange ratio. Different valuation methods may lead to different results on share value, distorting the share price for both of the companies and affecting shareholders.. Therefore, it is **recommended** that such an important matter should be also harmonized by the Directive on the EEA level. For instance, Member State may be given a possibility to choose from few valuation methods presented by the Directive. Hence countries involved in active cross-border merger process will be given a possibility to adopt the same approach to valuation through harmonisation tools.

2. Despite Directive 2017/1132 has been recently amended by Directive 2019/2121 it still lacks provisions on the majority required for the adopting of the resolution whether to approve the common draft terms of the cross-border merger. Therefore, it is **recommended** to include such requirement into Title II Chapter II of Directive 2017/1132, e.g. into Article 126 (1), and not just as a cross-reference to the rules for domestic mergers, as it is now the case.

3. With respect to Germany, the procedure on the acceptance of the cash compensation offer for *GmbH*, requiring notification within one month and the “actual” notarised acceptance within two month, is more complicated, that is it for the rest of the legal entities. It is **recommended** to provide the possibility for the members of GmbH to make only one acceptance, e.g. by easing the requirement on the notarisation of this particular declaration.

4. With respect to Ireland, Statutory Instrument No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023 in Regulation 37 (8)(b) stipulate that the Court’s decision, granted *erga omnes* effect, may provide for different levels of cash payment/compensation for different classes of shareholders. Given the current ambiguity with respect to what classes of shareholders shall be granted different levels of additional cash payment/compensation, it is **recommended** to amend the aforementioned Regulations in order to specify either classes of shareholders in question or rationale behind such approach.

5. With respect to Belgium, in order to ensure protection of equity between shareholders it is **recommended** to provide the Court’s decision with *erga omnes* effect. In the light of the requirement to pre-inform a company on intention to exercise exit right within Article 12:116/1, para. 1 of Belgian Code on Companies and Associations is also **recommended** to provide whether non-informing before general meeting and voting against during shall still provide for possibility to exit; and if no, what status is given to this shareholders.

LIST OF BIBLIOGRAPHY

Normative acts

1. "Act on Appraisal Proceedings." Spruchverfahrensgesetz – SpruchG. Bundesministerium der Justiz Bundesamt für Justiz. Accessed 8 November 2024. https://www.gesetze-im-internet.de/spruchg/_1.html
2. "Act on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG)." Bundesministerium der Justiz Bundesamt für Justiz. Accessed 8 November 2024. https://www.gesetze-im-internet.de/englisch_gmbhg/.
3. "AktG - Stock Corporation Act." Jusline Recht.Schnell. Accessed 25 November 2024. <https://www.jusline.at/gesetz/aktg/paragraf/225c>.
4. "Aktengesetz." Bundesministerium der Justiz Bundesamt für Justiz. Accessed 8 November 2024. <https://www.gesetze-im-internet.de/aktg/BJNR010890965.html#BJNR010890965BJNG000300308>
5. "Code des sociétés et des associations." Service Public Federal Justice. Accessed 12 November 2024. https://www.ejustice.just.fgov.be/cgi_loi/article.pl?language=fr&lg_txt=f&type=&sort=&numac_search=&cn_search=2019032309&caller=SUM&&view_numac=2019032309dx2019032309f#list-link-1
6. "Code Penal." Service Public Federal Justice. Accessed 14 November 2024. https://www.ejustice.just.fgov.be/cgi_loi/article.pl?language=fr&lg_txt=f&type=&sort=&numac_search=&cn_search=1867060801&caller=SUM&&view_numac=1867060801f
7. "Companies Act 2014." Irish Statute Book. Accessed on 5 November 2024. <https://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/print.html>
8. "Consolidated version of the Treaty on the Functioning of the European Union." EUR-lex. Accessed 2 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>
9. "Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law." EUR-lex. Accessed 2 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02017L1132-20220812>
10. "Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions." EUR-lex. Accessed 2 October 2024. <https://eur-lex.europa.eu/eli/dir/2019/2121/oj>
11. "Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies." EUR-lex. Accessed 2 October 2024. <https://eur-lex.europa.eu/eli/dir/2005/56/oj>
12. "European Parliament resolution of 13 June 2017 on cross-border mergers and divisions (2016/2065(INI)) (2018/C331/04)." EUR-lex. Accessed 23 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0248>
13. "Executive summary of the impact assessment - Proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions and as regards the use of digital tools and processes in company law." Directorate-General for Justice and Consumers, European Commission. Accessed 2 October 2024. https://commission.europa.eu/publications/company-law-package_en#details.

14. "Gesetz zur Umsetzung der Umwandlungsrichtlinie und zur Änderung weiterer Gesetze." *Bundesgesetzblatt*, Teil I, №51, 28 February 2023. Accessed 8 November 2024. <https://www.recht.bund.de/bgbl/1/2023/51/regelungstext.pdf?blob=publicationFile>
15. "Handelsgesetzbuch – HGB." Bundesministerium der Justiz Bundesamt für Justiz. Accessed 8 November 2024. https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p1594
16. "Loi modifiant le Code des sociétés et des associations, la loi du 16 juillet 2004 portant le Code de droit international privé et le Code judiciaire, notamment à la suite de la transposition de la directive (UE) 2019/2121 du Parlement européen et du Conseil du 27 novembre 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne les transformations, fusions et scissions transfrontalières." Service Public Federal Justice. Accessed 12 November 2024. <http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2023/06/06/151991.pdf>
17. "Loi relative aux professions d'expert-comptable et de conseiller fiscal du 17 mars 2019." Service Public Federal Justice. Accessed 14 November 2024. <https://www.ejustice.just.fgov.be/eli/loi/2019/03/17/2019040805/moniteur>
18. "Proposal for a directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and Proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions including annexes." Directorate-General for Justice and Consumers, European Commission. Accessed 2 October 2024. https://commission.europa.eu/publications/company-law-package_en#details
19. "S.I. No. 157/2008 - European Communities (Cross-Border Mergers) Regulations 2008". "Iris Oifigiúil" of 30th May, 2008, Irish Statute Book. Accessed on 5 November 2024. <https://www.irishstatutebook.ie/eli/2008/si/157/made/en/print#>
20. "Umwandlungsgesetz." Bundesministerium der Justiz Bundesamt für Justiz. Accessed 8 November 2024. https://www.gesetze-im-internet.de/umwg_1995/index.html
21. S.I. No. 233/2023 - European Union (Cross - Border Conversions, Mergers and Divisions) Regulations 2023." "Iris Oifigiúil" of 26th May, 2023, Irish Statute Book. Accessed on 5 November 2024. <https://www.irishstatutebook.ie/eli/2023/si/233/made/en/print>

Books

22. Bartkus, Gintautas, Belicka, Daina, Civilka, Mindaugas, Conac, Pierre-Henri, Teichmann, Christoph, Lambooy, Tineke and Hannigan, Brenda. *Study on Minority Shareholders Protection*. Luxembourg: Publications Office of the European Union, 2018. <http://dx.doi.org/10.2139/ssrn.3225130>
23. European Commission: Directorate General for Parliamentary Research Services of the Secretariat of the European Parliament and Truli, Emmanuela. *Ex-post analysis of the EU framework in the area of cross-border mergers and divisions*. Brussels: Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, 2016. doi:10.2861/246369
24. European Commission: Directorate General for the Internal Market and Services., Bech Bruun., and Lexidale., *Study on the Application of the Cross-Border Mergers Directive*. Luxembourg: Publications Office, 2013. <https://data.europa.eu/doi/10.2780/96404>.

25. European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs. *Comparative Legal Analysis of Merger Rules Concerning Associations in the EU - Final Report*. Luxembourg: Publications Office of the European Union, 2023. <https://data.europa.eu/doi/10.2873/05056>
26. European Commission: Directorate-General for Justice and Consumers. *Study on the law applicable to companies – Final report*. Luxembourg: Publications Office of the European Union, 2016. <https://data.europa.eu/doi/10.2838/527231>
27. Grundmann, Stefan. *European Company Law. Organization, Finance and Capital Markets. 2nd edition*. Cambridge: Intersentia, 2012.
28. Lynch Fannon, Irene. “Development of Irish Company Law and Membership of the EU.” In *Corporations and Partnerships in Ireland*. Wolters Kluwer, 2024. <https://shorturl.at/UWMzu>
29. Micheler, Eva. *Company Law. A Real Entity Theory*. New York: Oxford University Press, 2021.
30. RiskMetrics Group. *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States*, 2009. https://www.guberna.be/sites/default/files/public/202003/study_on_monitoring_and_enforcement_practices_in_corporate_governance_in_the_member_states.pdf
31. Schmidt, Jessica, Directorate-General For Internal Policies Policy Department Citizens' Rights And Constitutional Affairs. “Cross-border mergers and divisions: Is there a need to legislate?” European Union, 2016. <http://www.europarl.europa.eu/supporting-analyses>
32. Stack, Margaret, McCarthy, Jennifer and Greene, Michael. “Ireland”, in Van Gerven, Dirk. *Cross-Border Mergers in Europe: Volume II*. New York: Cambridge University Press, 2011. https://web-p-ebscobhost-com.skaitykla.mruni.eu/ehost/ebookviewer/ebook/ZTAwMHh3d19fNDAwNTc4X19BTg2?sid=97acfac9-0f32-42ed-80c0-9f087d664219@redis&vid=0&format=EB&lpid=lp_44&rid=0
33. Van Gerven, Dirk. “Belgium”, in Van Gerven, Dirk. *Cross-Border Mergers in Europe: Volume II*. New York: Cambridge University Press, 2011. https://web-p-ebscobhost-com.skaitykla.mruni.eu/ehost/ebookviewer/ebook/ZTAwMHh3d19fNDAwNTc4X19BTg2?sid=97acfac9-0f32-42ed-80c0-9f087d664219@redis&vid=0&format=EB&lpid=lp_44&rid=0
34. Wuesthoff, Andreas. “Germany”, in Van Gerven, Dirk. *Cross-Border Mergers in Europe: Volume II*. New York: Cambridge University Press, 2011. https://web-p-ebscobhost-com.skaitykla.mruni.eu/ehost/ebookviewer/ebook/ZTAwMHh3d19fNDAwNTc4X19BTg2?sid=97acfac9-0f32-42ed-80c0-9f087d664219@redis&vid=0&format=EB&lpid=lp_44&rid=0

Articles

35. Alavi, Hamed and Khamichonak, Tatsiana. "To Be or Not to Be; the EU Cross-Border Mergers Framework and Harmonization of Dissenting Shareholder's Rights." *Hungarian Journal of Legal Studies* 58, no. 3 (2017). <https://heinonline.org/HOL/P?h=hein.journals/ajur58&i=310>
36. Andersen, Paul Krüger and Andersson, Jan Bertil and Bartkus, Gintautas and Baums, Theodor and Clarke, Blanaid J. and Conac, Pierre-Henri and Corbisier, Isabelle and Daskalov, Waltschin and Engrácia Antunes, José and Fuentes, Mónica and Giudici, Paolo

- and Hannigan, Brenda and Kalss, Susanne and Kisfaludi, Andras and de Kluiver, H. J. and Opalski, Adam and Patakyova, Maria and Perakis, Evanghelos Emm. and Porkona, Jarmila and Roest, Joti and Sillanpää, Matti J. and Soltysinski, Stanislaw and Teichmann, Christoph and Urbain-Parleani, Isabelle and Vutt, Andres and Sørensen, Karsten Engsig and Winner, Martin and De Wulf, Hans. "European Model Company Act (*EMCA*). First Edition, 2017." *Nordic & European Company Law Working Paper* No. 16-26. <https://ssrn.com/abstract=2929348>
37. Bartman, Steef M. "10 Years Cross-Border Mergers Directive: Some Observations About EU Border Protection and Minority Exit Rights." *European Company Law Journal* 14, no. 6 (2017): <https://kluwerlawonline.com/journalarticle/European+Company+Law/14.6/EUCL2017032>
38. Behrens, Peter. "International Company Law in View of the Centros Decision of the ECJ." *European Business Organization Law Review* 1, no. 1 (2000). <https://heinonline.org/HOL/P?h=hein.journals/eunbuioiz1&i=133>
39. Benedetti, Lorenzo. "The Protection of Shareholders in Cross-Border Conversions, Mergers, and Divisions." *Orizzonti del Diritto Commerciale: Rivista on Line Dell'Associazione Italiana dei Professori Universitari di Diritto Commerciale* 2023, no. 3 (2023). <https://heinonline.org/HOL/P?h=hein.journals/oidldoco2023&i=1015>
40. Corbisier, Isabelle. "Cross-Border Mobility Within the EU and Specifically in Luxembourg and Belgium: Same Destination, Different Roads." *European Company Law Journal* 16, no. 1 (2019). <https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019004>
41. Davies, Paul L. and Emmenegger, Susan and Ferran, Eilis and Ferrarini, Guido and Hopt, Klaus J. and Moloney, Niamh and Opalski, Adam and Pietrancosta, Alain and Roth, Markus and Skog, Rolf R. and Winner, Martin and Winter, Jaap W. and Winter, Jaap W. and Wymeersch, Eddy O. The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment. *European Company and Financial Law Review Forthcoming, Oxford Legal Studies Research Paper* No. 25/2018. <https://ssrn.com/abstract=3257846>
42. Dubravka, Akšamović, Šimunović, Lidija, and Kuna, Iva. "CROSS BORDER MOVEMENT OF COMPANIES: THE NEW EU RULES ON CROSS BORDER COVERSION". *EU and Comparative Law Issues and Challenges Series (ECLIC)* 3 (2019). <https://doi.org/10.25234/eclit/9038>.
43. Garcimartin, Francisco and Gandia, Enrique. "Cross-Border Conversions in the EU: The EU Commission Proposal." *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4717207
44. Knapp, Vanessa. "Cross border mobility: what do we need in practice?" *ERA Forum* 19, (2018). <https://doi.org/10.1007/s12027-018-0495-6>
45. Kurtulan, Gokce. "Minority Shareholder Protection in Cross-Border Mergers: A Must for or an Impediment to the European Single Market?" *European Business Organization Law Review* 18, no. 1 (2017). <https://heinonline.org/HOL/P?h=hein.journals/eunbuioiz18&i=101>
46. Meeusen, Johan. "Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-Border Corporate Mobility in the

- Internal Market." *Journal of Private International Law* 13, no. 2 (2017). <https://doi.org/10.1080/17441048.2017.1353819>
47. Mikalonienė, Lina and Kolev, Nikolay. "The Statutory Exit Right of a Minority Shareholder in a Private Limited Company under Lithuanian and Bulgarian Company Law." *International Comparative Jurisprudence* 10, no. 1 (2024). <https://heinonline.org/HOL/Page?handle=hein.journals/icjuris10&collection=journals&id=144&startid=144&endid=158>
 48. Papadopoulos, Thomas. "Legislation Commentary: Amendments on the EU Harmonization of Cross-Border Mergers after the Adoption of Directive 2019/2121." *European Business Law Review (Kluwer)*, Volume 34, Issue 5, 2023. <https://ssrn.com/abstract=4566841>
 49. Papadopoulos, Thomas. "Protection of shareholders in cross-border mergers: the new harmonized rules." *European Company and Financial Law Review* 18, no. 6 (2021). <https://doi.org/10.1515/ecfr-2021-0038>.
 50. Schmidt, Jessica . "The Mobility Aspects of the EU Commission's Company Law Package: Or – 'The Good, the Bad and the Ugly.'" *European Company Law Journal* 16, no. 1 (2019). <https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019003>
 51. Schmidt, Jessica. "Cross-Border Mergers, Divisions and Conversions: Accomplishments and Deficits of the Company Law Package." *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019). <https://www.europarl.europa.eu/cmsdata/105632/schmidt.pdf>
 52. Teichmann, Christoph. "Cross-border Conversions, Mergers and Divisions Based on Directive (EU) 2019/2121" (2023). <https://ssrn.com/abstract=4445498>
 53. Teichmann, Christoph. "The Company Law Package - Content and State of Play." *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019). <https://heinonline.org/HOL/P?h=hein.journals/ecomflr16&i=3>
 54. Van den Broek, Harm. "Exit Taxation of Cross-Border Mergers After National Grid Indus." *Studi Tributari Europei* 3, 1 (2011). <https://doi.org/10.6092/issn.2036-3583/4819>.
 55. Van Der Elst, Christoph. "21st Century Company Law in Belgium." *European Company Law Journal* 17, no. 2 (2020). <https://kluwerlawonline.com/journalarticle/European+Company+Law/17.2/EUCL2020006>
 56. Van Gerven, Dirk and Berlingin, Maxime. "Arbitration and Company Law in Belgium." *European Company Law* 12, no. 3 (2015). <https://kluwerlawonline.com/journalarticle/European+Company+Law/12.3/EUCL2015020>
 57. Ventoruzzo, Marco. "Cross-Border Mergers, Change of Applicable Corporate Laws and Protection of Dissenting Shareholders: Withdrawal Rights Under Italian Law." *Penn State Legal Studies Research, Bocconi Legal Studies Research Paper* No. 16, *European Company and Financial Law Review (ECFR)*, (2007). <https://ssrn.com/abstract=960579>
 58. Winner, Martin. "Protection of Creditors and Minority Shareholders in Cross-Border Transactions." *European Company and Financial Law Review (ECFR)* 16, no. 1-2 (2019). <https://heinonline.org/HOL/P?h=hein.journals/ecomflr16&i=44>
 59. Wyckaert, Marieke and Geens, Koen. "Cross-border mergers and minority protection An open-ended harmonization." *Utrecht Law Review*, 4, 1 (2008). <https://doi.org/10.18352/ulr.60>.

Case law

60. CJEU, judgement of 15 July 1964, Flaminio Costa v E.N.E.L., Case C-6/64 p.596. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A61964CJ0006>
61. CJEU, judgement of 28 January 1986, Commission of the European Communities v French Republic, Case C - 270/83, §13, 22. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0270>
62. CJEU, judgement of 15 October 1986, Commission of the European Communities v Italian Republic, Case C-168/85 §11. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0168>
63. CJEU, judgement of 15 February 1996, Inasti (Institut National d'Assurances Sociales pour Travailleurs Indépendants) v Hans Kemmler Case C-53/95 §9. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0053>
64. CJEU, judgement of 9 March 1999, Centros Ltd, Case C - 212/97, §28, ECLI:EU:C:1999:126. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0212>
65. CJEU, judgement of 13 December 2005, Sevic Systems AG, Case C-411/03, ECLI:EU:C:2005:762, InfoCuria. Case-law. Accessed 29 October 2024. <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/03>
66. CJEU, judgement of 23 February 2006, CLT-UFA SA v Finanzamt Köln-West, Case C-253/03 §12. EUR-Lex. Accessed 29 October 2024. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0253>

Miscellaneous

67. “Belgium implements the EU mobility directive: what changes for M&A?. Maxime Colle (LYDIAN). Accessed 12 November 2014. <https://www.lydian.be/en/news/belgium-implements-eu-mobility-directive-what-changes-ma>
68. “Belgium Implements the EU Mobility Directive.” Cleary Gottlieb Steen & Hamilton LLP. Accessed 12 November 2024. <https://www.clearygottlieb.com/-/media/files/alert-memos-2023/belgium-implements-the-mobility-directive.pdf>
69. “Companies Registration Office Report 2022”, Companies Registration Office Ireland, accessed 5 November 2024, https://opac.oireachtas.ie/Data/Library3/Documents%20Laid/2023/pdf/DETEdoclaid050723_153325.pdf
70. “Companies Registration Office Report 2023.” Companies Registration Office Ireland. Accessed 5 November 2024. <https://cro.ie/wp-content/uploads/2024/07/CRO-Annual-Report-2023.pdf>
71. “Consultation on Directive (EU) 2019/2121 of 27 November 2019 (the Cross-Border Conversions and Divisions Directive) Review Group Submission on Member State Options.” Company Law Review Group, Department of Enterprise, Trade and Employment. 13 October 2020. Accessed 5 November 2024. <https://enterprise.gov.ie/en/consultations/consultations-files/clrg-submission-eu-directive-2019-2121-consultation.pdf>
72. “Conversion Directive Implementation Act Adopted: Legal Framework For Cross-Border Changes Of Legal Form And Divisions Of Corporations – Simplification Of Mergers –

- Acceleration Of Shareholder Compensation Appraisal Proceedings.” Gleiss Lutz. Accessed on 11 November 2024. <https://www.gleisslutz.com/en/news-events/know-how/conversion-directive-implementation-act-adopted-legal-framework-cross-border-changes-legal-form-and-divisions-corporations>
73. “Definition of concept from the Cambridge Academic Content Dictionary,” *Cambridge University Press*. Accessed 31 October 2024. <https://dictionary.cambridge.org/dictionary/english/concept>
74. “Die personalistisch geprägte GmbH im Lichte des neuen Beschlussmängelrechts des HGB.” Rödl&Partner. Accessed 25 November 2024. <https://www.roedl.de/themen/newsletter-corporate-briefing/2024-09/personalistisch-gepraegte-gmbh-lichte-beschlussmaengelrechts-hgb>
75. “Frequently Asked Questions: New Company Law Rules”, European Commission. Accessed on 31 October 2024. https://ec.europa.eu/commission/presscorner/detail/pt/memo_18_3509
76. “Implementing The Mobility Directive.” Dr Winfried Richardt, Advant Beiten. Accessed on 11 November 2024. <https://www.advant-beiten.com/en/news/umsetzung-der-umwandlungsrichtlinie-umzug>
77. “Ireland adopts new regulations to enhance corporate cross-border EU mobility.” Pinsent Masons, (5 June 2023). Accessed on 5 November 2024. <https://www.pinsentmasons.com/out-law/news/ireland-adopts-new-regulations-to-enhance-corporate-cross-border-eu-mobility>
78. “Irish Companies Act 2014 Overview.” Mason Hayes & Curran. Accessed on 5 November 2024. <https://www.mhc.ie/latest/insights/irish-companies-act-2014-overview>
79. “Merger Documents.” Vastned. Accessed 15 November 2024. <https://vastned.com/merger-documents/>
80. “New Regulations on Cross Border Conversions, Mergers and Divisions.” Mason Hayes & Curran. Accessed on 5 November 2024. <https://www.mhc.ie/latest/insights/new-regulations-on-cross-border-conversions-mergers-and-divisions>
81. “Public Consultation on the Transposition of Directive (EU) 2019/2121 of the European Parliament and Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. Company Law.” Department of Business, Enterprise and Innovation. Accessed 5 November 2024. <https://enterprise.gov.ie/en/consultations/consultations-files/public-consultation-transposition-directive-eu-2019-2121.pdf>
82. Deutscher Anwaltverein. Stellungnahme zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates zur Änderung der RL 2017/1132/(EU) in Bezug auf grenzüberschreitende Umwandlungen, Verschmelzungen und Spaltungen COM (2018) 241. https://anwaltverein.de/de/newsroom/sn-31-18-richtlinienvorschlag-com-2018-241-final?file=files/anwaltverein.de/downloads/newsroom/stellungnahmen/2018/dav-sn_31-18.pdf
83. Explanatory note of the Regulation 233/2023. Accessed 5 November 2024. <https://www.irishstatutebook.ie/eli/2023/si/233/made/en/pdf>
84. Schmidt, Jessica. “Stellungnahme zum Entwurf eines Gesetzes zur Umsetzung der Umwandlungsrichtlinie (BT-Drs. 20/3822).” *Öffentliche Anhörung des Rechtsausschusses des Deutschen Bundestages* am 7. November 2022.

https://www.bundestag.de/resource/blob/918824/f5b77a7694b171ce615c4eba9a499d3b/Stellungnahme_Schmidt.pdf

85. Vossius, Oliver. "Stellungnahme für die Sachverständigenanhörung des Rechtsausschusses des Deutschen Bundestags zum Entwurf eines Gesetzes zur Umsetzung der Umwandlungsrichtlinie am 7. November 2022 BT-Drucks. 20/3822," 02.11.2022: 1-7. https://www.bundestag.de/resource/blob/918966/8f38c844c0ab176ce4ae4bf8d2308bdc/Stellungnahme_Vossius.pdf

ABSTRACT

Startsun N. Protecting Shareholder Rights in Corporate Cross-Border Mergers in the Single Market, master thesis. Supervisor Prof. Dr. Lina Mikalonienė. – Vilnius: Mykolas Romeris University, Law School, 2024.

This master thesis are devoted to the research on the shareholder rights protection in corporate cross-border mergers in the single market. It examines the concept and the regulation of the cross-border merger, as well as the risks shareholders face during this operation. Also it explores existing mechanisms of shareholders rights protection in the cross-border mergers contained in Directive 2017/1132, in particular right to information and right to vote on the approval of cross-border merger, the exit right for dissenting shareholders and the right to dispute share exchange ratio for remaining shareholders.

The research is based on the analysis of implementation practice of selected protection mechanisms in representatives of developed economies – Germany, Ireland and Belgium. It was concluded that after successful implementation of the Directive, shareholders within selected jurisdictions are protected by provided there protective mechanisms.

Key words: shareholder rights, protection mechanism, cross-border merger, single market, implementation.

SUMMARY

The framework of this master thesis “Protecting Shareholder Rights in Corporate Cross-Border Mergers in the Single Market” is defined by its aim and devoted to the research on certain mechanisms for shareholder rights protection in cross-border mergers in the single market, contained in the Directive 2017/1132 (with amendments), and to analysis of their implementation into the company law of selected jurisdictions – Germany, Ireland and Belgium. For the purpose of achieving the provided aim the following objectives were established: 1. to analyse the concept of cross-border merger and to define the main perils to the shareholder rights in cross-border mergers in the single market; 2. to determine and analyse the mechanism of shareholder rights protection in the cross-border mergers contained in the Directive; 3. to analyse the implementation these mechanisms into company law of the selected jurisdictions.

This master’s thesis is structured into three parts. The first part introduces the concept of the cross-border merger: the development of its regulation, key characteristics of cross-border merger and freedom of establishment as a prerequisite of corporate mobility. It also defines the main risks shareholders face in cross-border mergers. The second part analyzes the mechanisms protecting shareholder’s rights against identified risks in corporate cross-border mergers contained in Directive 2017/1132. The third part assesses the way selected jurisdictions – Germany, Ireland and Belgium – have implemented the outlined protecting rules onto their national company law together with the peculiarities of each jurisdiction’s approach.

The research showed that shareholders are threatened by disadvantageous change of applicable law as a result of the cross-border merger; by inadequately set the share exchange ratio; and by the possibility of value-destroying effect of the cross-border merger on the assets of merging companies. To protect them against outlined perils, the Directive provides shareholders with the right to a wide range of information, the right to vote for or against approval of the cross-border merger, the right to exit the company against cash compensation for dissenting shareholders and the right to dispute share exchange ratio for remaining shareholders, as well as both right to dispute cash consideration provided.

Each jurisdiction implemented the mandatory elements of the Directive’s provisions, in some cases excluding optional measures left to the discretion of Member States, such as *erga omnes* obligation or possibility to provide shares or other compensation instead of a cash payment. Moreover, the analysis evidenced the successful implementation of the protection mechanisms in the company law of selected jurisdictions, even though all the Member States analysed were late from the deadline established for implementation. The main outcomes are that national company law of Germany, Ireland and Belgium aligns with the obligatory Directive’s provisions ensuring that the shareholder rights in cross-border mergers in the single market are protected.